15356

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RECORD, CASE NO. 15356.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 972.

JOHN GOURKO, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED JULY 22, 1893.

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in the case of United States vs. John Gourko, indicted for murder.

1 *Indictment.*

United States of America, western district of Arkansas. In the circuit court, November term, A. D. 1892.

UNITED STATES
vs.
JOHN GOURKO. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn and charged, to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That, John Gourko, a white man and not an Indian, on the 1st day of November, A. D. 1892, at the Choctaw Nation in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Peter Carbo then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said John Gourko with a certain gun then and there, charged with gunpowder and one leaden bullet, which said gun, he the said John Gourko in his hand then and there had and held, then and there feloniously, willfully and of his malice aforethought, did discharge and shoot off, to, against and upon the said Peter Carbo, and that the said John Gourko with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said John Gourko discharged and shot off as aforesaid, then and there feloniously, willfully and of his malice aforethought, did strike, penetrate and wound him the said Peter Carbo in and upon the left side of the head of him, the said Peter
2 Carbo, giving to him the said Peter Carbo then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said John Gourko, in and upon the left side of the head of him the said Peter Carbo, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he the said Peter Carbo then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Gourko, him the said Peter Carbo in the manner and by the means aforesaid feloniously, willfully and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 60. United States vs. John Gourko. A true bill. Clyde C. Patton, foreman. Witnesses: John Leachman, lives at Alderson, I. T.; Wm. Wingo, lives at Alderson, I. T.; Felix Augus-

tine, lives at Alderson, I. T.; Thos. Whitney, lives at Alderson, I. T.; John Rutledge, lives at Alderson, I. T. Filed in open court, Nov. 22, 1892. Stephen Wheeler, clerk. By I. M. Dodge, D. C.

3 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, November term, 1892.

TUESDAY MORNING, 8½ o'clock, *November* 22, 1892.

Court met pursuant to adjournment. Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* JOHN GOURKO. } Indictment for murder, No. 60.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment, and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment, and puts himself upon the country.

Whereupon, by agreement of parties, it is ordered by the court that this cause be, and the same is hereby, continued to the next term of this cour and stet down for trial Feb. 6, 1893.

FEBRUARY TERM, 1893, *Thursday, Feb.* 9, 1893.

(Caption omitted.)

On this day come on to be heard the application for witnesses in this cause heretofore filed, and the court, being fully advised in the premises, doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Mrs. Annie Dobbins, Doc Anderson, Mrs. John Davis, Mike Dousett, John Cherbolee, John Varguer, John Breska, and John Solata, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them, returnable February 16, 1893.

4 WEDNESDAY, *February* 22, 1892.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal, and by his attorneys, N. L. Marmon, esq., and Thos. H. Barnes, esq., and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court more than two en-

tire days heretofore, and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff by its attorney, ordered that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant had exercised, in the presence of the defendant, their full right of challenge, under the law, the following were selected for the trial of this cause, to wit: Henry C. Allen, John Armstrong, Isaac Burchfield, Jas. K. P. Burnett, Thos. A. Conden, Wm. G. Dodson, August Fischer, Marion F. Gardner, Wm. K. Hughes (West Fork), John M. Herrod, Sherrod Merritt, Samuel Wilburn, twelve good and lawful men of the district aforesaid, duly selected, empaneled and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the evidence and there not being time to further progress in the trial of this cause they were
5 put in charge of a sworn bailiff of this court. And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

THURSDAY, *February* 23, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, N. L. Marmon, esq., and Thos. H. Barnes, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Henry C. Allen, John Armstrong, Isaac Burchfield, Jas. K. P. Burnett, Thos. A. Conden, Wm. G. Dodson, August Fischer, Marion G. Gardner, Wm. K. Hughes (West Fork), John M. Herrod, Sherrod Merritt, Samuel Wilburn, who took their seats in the jury box and after hearing the balance of the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause they were put in charge of the sworn bailiff aforesaid.

FRIDAY, *February* 24, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, N. L. Marmon,
esq., and Thos. H. Barnes, esq., and now come the jury heretofore
6 empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Henry C. Allen, John Armstrong, Isaac Burchfield, Jas. K. P. Burnett, Thos. A. Conden, Wm. G. Dodson, August Fischer, Marion G. Gardner, Wm. K. Hughes (West Fork), John M. Herrod, Sherrod Merritt, Samuel Wilburn, who took their seats in the jury box, and after hearing the balance of the argument of counsel and receiving the charge of the court, retired in charge of the sworn bailiff aforesaid to consider their verdict, and after some time returned into court the following verdict, to wit:

"We, the jury, find the defendant guilty of murder as charged in the within indictment."

(Signed) AUGUST FISCHER, *Foreman.*

Whereupon, by order of the court, the jury was discharged from the further consideration of the case and the said defendant remanded to the custody of the marshal to await final sentence.

WEDNESDAY, *April 5th*, 1893.

(Caption omitted.)

On this day come the said defendant by his attorney and files his motion to set aside the virdict of the jury and for a new trial in this cause.

SATURDAY, *April* 29, 1893.

(Caption omitted.)

On this day come on to be heard the motion heretofore filed by the said defendant to set aside the verdict of the jury and for a new trial in this cause, and the court being well and sufficiently advised in the premises doth overrule the same.

To which ruling of the court the defendant at the time excepted.

7 SATURDAY, *April* 29, 1893.

(Caption omitted.)

On motion of James F. Read, esq., attorney for the western district of Arkansas, the said defendant, John Gourko, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 24 day of Feb., 1893, shall not be now pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid, cause the said John Gourko to be taken hence, and him, the said John Gourko, safely and securely keep, from the date hereof, until Wednesday, the 12th day of July, A. D. 1893, and on that day, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Gourko to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Wednesday, the said day of July, in the year of our Lord one thousand eight hundred and ninety-three, cause the said John Gourko to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

8 SATURDAY, *April* 29, 1893.

(Caption omitted.)

Ordered by the court that the said defendant have until June 1st, 1893, to file his bill of exceptions herein.

SATURDAY, *June* 10, 1893.

(Caption omitted.)

On this day, on motion of defendant, it is ordered by the court that defendant have further extension of time, to June 20, 1893, to perfect his appeal herein.

9 MAY TERM, *Tuesday, June* 20, 1893.

(Caption omitted.)

Ordered by the court that defendant have further time, to June 26, in which to file his bill of exceptions in this cause.

MONDAY, *June* 26, 1893.

(Caption omitted.)

On this day come the said defendant by his attorney, Thos. H. Barnes, esq., and tenders his bill of exceptions, and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

And the defendant, also, files his assignment of errors and petition for writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

TUESDAY, *June* 27, 1893.

(Caption omitted.)

On this day come the clerk of this court and makes known that a writ of error, taking this case to the Supreme Court of the United States, has been issued by said clerk in this cause.

It is therefore hereby ordered by the court that execution of sentence heretofore pronounced in this cause, be stayed, pending the action of the Supreme Court.

10 *Bill of exceptions—filed June* 26, 1893.

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
JOHN GOURKO, DEFENDANT.

Be it remembered that on the trial of the above-entitled cause, the Government to maintain the issues on its part offered the testimony of the following witnesses, to wit: James Leachman, William Wingo, Felix Augustine, Thomas Whitney, John Rutledge, who testified as follows, to wit:

11 JAMES LEACHMAN, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. What is your name?

Answer. James Leachman.

Q. Do you know the defendant?

A. Yes, sir.
Q. What is his name?
A. John Gerko.
Q. Did you know Peter Carbo in his lifetime?
A. Yes, sir.
Q. The defendant, John Gerko, is charged with having murdered Peter Carbo on the first day of November last, 1892, at Alderson; were you present at the time he was killed?
A. Yes, sir.
Q. Where was it?
A. It was in front of Bill Craig's billiard hall, in Alderson, Choctaw Nation.
Q. What part of the Choctaw Nation?
A. It is near South McAlister; five miles from South McAlister.
Q. East or west of the M. K. & T. Railway?
A. East.
Q. And upon the Choctaw road, is it not?
A. Yes, sir.
Q. The Choctaw Coal & Railway Co. Road?
A. Yes, sir.
Q. In the Indian country?
A. Yes, sir.
Q. Is the defendant a white man or an Indian?
A. He is a white man.
Q. What was Carbo?
A. He was a white man.
Q. What nationality was Carbo?
A. He was a Polander, I think.
Q. What is the defendant?
A. Hungarian, I think they say.
Q. You were present at the time that Carbo was killed?
A. Yes, sir.
Q. What time in the day was it?
12 A. About 9 or 10 o'clock; somewheres along there.
Q. At whose billiard hall did you say it was?
A. Bill Craig's.
Q. You may go on and state what you know about it.
A. Me and Mr. Rutledge was in there playing a game of billiards. Pete and several others were standing around watching us, and Gerko came to the door——
Q. Pete Carbo is the man who was killed?
A. Yes, sir.
Q. He was in the billiard hall watching you and Rutledge play billiards, and there were several others in there?
A. Yes, sir; Gerko came to the door and said, "Pete, you called me a son of a bitch, didn't you?"
Q. Gerko came to the door and said, "Pete, you called me a son of a bitch, did'nt you?" What door did he come to?
A. The billiard-hall door.
Q. Was the door open or shut?
A. It was open.

Q. Did he go inside?

A. No, sir; he set one foot up in the door; sort of leaned up against the door-facing.

Q. He said what?

A. He said, "You called me a son of a bitch, didn't you?"

Q. Do you know where his hands were at that time?

A. No, sir; I never noticed.

Q. Go ahead.

A. Pete said, "Well," or something of that kind. I didn't understand what he said; he said something or another. Gerko said, "Come and go with me down here and I will fix you for that; we will settle this matter; I will fix you." Pete never said nothing; sort of stepped out of the door, and Pete then said, "You want to fight, don't you?" and Gerko said, "Yes." Pete said, "You have got a gun or knife on you,"
13 and I didn't exactly understand what the defendant said. I think he said, "Yes; I have," or something or another. Pete said, "If you want to fight we will fight right here; here is a good enough place to fight," and Gerko run his hand in his hip pocket and pulled out a gun——

Q. A pistol?

A. Yes, sir; he said, "We will fight right here, will we?" and shot, and he shot direct straight up in the air—pretty near it—and the next shot he shot a little bit lower, and the third shot he hit him.

Q. Where did he hit him?

A. In the left side of his head.

Q. How far from the ear?

A. About an inch above the cheek bone, right in the temple.

Q. When the defendant shot him what did the deceased do, and what was he doing during the time the defendant was shooting?

A. He was dodging from the shots that were fired, and the third shot he fell.

Q. Did he say anything?

A. Not that I heard.

Q. Did he say anything while he was shooting?

A. No, sir.

Q. Did the defendant say anything while he was shooting?

A. No, sir.

Q. How far apart were they?

A. They were about 5 or 6 feet; somewheres along there.

Q. Did the deceased have any weapons?

A. I didn't see any.

Q. You may state what was the positions of his hands, if you know.

A. He had one hand on his breast or on his breast bosom, he had his hand up there; I think he had it about halfway in his bosom, right about that; I didn't notice which hand at all.

Q. Do you remember how and when he put it there?

A. No, sir; I do not.

14 Q. Was he armed?

A. No, sir.

Q. Had no arms?

A. I didn't see any.

Q. After he had shot him and he fell, what did the defendant do?
A. He started off and I caught him.
Q. Started off how?
A. Started off in a tolerable fast walk.
Q. Without saying anything?
A. He never said nothing.
Q. You caught him, and then what?
A. I threw him down, and he had done put his pistol in his pocket when he started off; and I threw him down, and he made an effort as to turn the pistol towards me, and I run my thumb in between the trigger and the guard so he could not pull it.
Q. Go ahead.
A. Guss Felix he took it away from him, and I got up off of him and told him to come on and go with me, and I started with him to the boarding house, where the night watchman was; I didn't have any arms on me; I met Mr. Hendricks, and he said to give him to him and he would take him, and told him to consider himself under arrest.
Q. Who was Mr. Hendricks?
A. A United States marshal.
Q. You saw Pete throw his hand to his bosom or in it; I will ask you what his custom was in regard to that?
A. Heap of times around there of an evening when Pete was done work you would see him walking around with one hand in his bosom; it was a habit of him, I guess.
Q. Did he make any effort to strike the defendant?
A. No, sir; not while the shooting was going on.
Q. You say he didn't say anything?
A. No, sir.
Q. Did he make any efforts to go towards him?
A. No, sir.
Q. Who got his pistol from his hip pocket after he put it in when you seized him?
A. He got it himself.
Q. You think this occurred about half past 9 o'clock, do you?
A. Yes, sir; about half past 9 or 10 o'clock; somewheres along there.
Q. Did you notice whether or not the deceased has his hand in his bosom before the defendant came?
A. No, sir; I did not.
Q. I notice before the commissioner you mention that.
Mr. BARNES (of counsel for defendant). Never mind.
The DISTRICT ATTORNEY. You say you do not remember that?
A. No, sir; he stepped out of doors, and he had his hand in his bosom when he got on the ground. I never noticed him before the defendant came up.
Q. I notice before the commissioner that you said he had it in there before, but you can not remember it, of course you can't.
A. When he stepped out on the ground——
Q. On cross-examination before the commissioner you say: "Deceased *his* his hand in his bosom before defendant came up, and had it there all the time, even when he fell."

Mr. BARNES (of counsel for defendant). I do not think it is right to read that to him.

The DISTRICT ATTORNEY. If you do not remember it now independent of that do not state it. You state that neither man said anything during this shooting.

A. No, sir; not after the shooting commenced.

Q. Did the deceased speak after he was shot?

A. No, sir; I don't think he did; I didn't hear him.

Q. What was the first word that the defendant said, or the first sentence that he uttered, after the shooting that you remember?

16 A. When I threw him down, he says, "Don't, Jim; Pete called me a son of a bitch," and he said, "I fixed him for it."

Q. Who was present in the billiard hall, if you remember; name them?

A. There was Bill Craig.

Q. Is he here?

A. No, sir; and John Rutledge.

Q. He is here.

A. Yes, sir; and Mike Donsot, or some such a name. That is all I remember. There was others in there, but I do not remember who.

Q. Do you remember whether Thomas Whitney was in there?

A. Yes, sir; I don't think he was in there.

Q. Felix Augustine?

A. Yes, sir; he was there.

Q. Thomas Whitney was not in there?

A. No, sir.

Q. Did you see him afterwards?

A. Yes, sir; I saw him after Carbo was killed.

Q. How long did Carbo live after he was shot?

A. I never run to him after he fell. I was ahold of Gerko there. Some of them said he never drew another breath after he fell.

Q. You saw him after he was shot?

A. Yes, sir.

Q. How long before you discovered he was dead?

A. About a couple of minutes or more.

Q. You say the ball entered over the left ear.

A. Yes, sir.

Q. Did it go clear through?

A. No, sir; it stopped up right about here. I saw the doctor run the probe in afterwards.

Q. How far did he run the probe in?

A. About 6 inches.

Q. What kind of a pistol was it that the defendant had?

A. A new No. 32.

Q. Do you know what became of it?

A. Mr. Hendricks kept it, I reckon.

17 Q. This occurred at Alderson, in the Choctaw Nation, Indian country, on the first day of November, 1892?

A. Yes, sir.

Q. And the defendant is a white man, and I believe you say the deceased was a white man?

A. Yes, sir.

Cross-examination by Mr. THOS. H. BARNES:

Q. What day of the week was the first day of November?

A. I do not remember.

Q. Was it a holiday there among the Slavs and others, the Italians, and so on?

A. No, sir; it was the first day of the month, and there don't many miners work on the first day of the month. A heap of them lay off on that day. They started up that morning to work, and there wasn't enough men down in the pit to run and they stopped. That is how come me to be out.

Q. The work was not going on in the mines that day?

A. No, sir.

Q. Whether it was a holiday or not, you say they are not in the habit of working on the first day of the month?

A. No, sir; there is not many men work then.

Q. You do not remember the day of the week?

A. No, sir.

Q. Were you present in the mines at one time when this man Pete was abusing a brother of this defendant?

A. Yes, sir.

Q. How long was that before this occurrence?

A. It was about two weeks, I believe; two or three weeks, or somewheres along there.

Q. What language was he applying to him?

18 A. They were talking Polish, part of it; I could not understand nothing of it only "son of a bitch," and the check part; I could und'rstand that. They speak that in English.

Q. How long was that before?

A. About 2 weeks, I think; somewheres along there; I could not be positive what time.

Q. Where did this defendant work there at that time?

A. He worked in No. 5 east, I think.

Q. How near to where Pete was?

A. Pete worked in the third west; it was two entries below where Pete worked at, and Pete worked on the west side and John worked on the east side.

Q. There is what is called a slope in these mines and from that slope there are different entrances?

A. Yes, sir; different entries turns off.

Q. How far apart, now, in this slope, were these men working at that time?

A. Pete was working 600 feet of him.

Q. What work did the brother of this young man do there?

A. He pushed in the mines for the drivers.

Q. How long had you known Pete there?

A. I knew him about 14 or 15 months, I guess.

Q. At the time this occurred was this man Pete boarding at the same house or different house?

A. I don't know, sir; I think Pete was boarding at Davises, and he was boarding over at New Town, or somewhere there.

Q. Mrs. John Davis'?

A. Yes, sir.

Q. She has moved away from there and gone back North, has she not?

A. She is gone somewheres; I don't know whereabouts.

Q. That is where Pete boarded?

A. Yes, sir.

Q. You do not know of your own knowledge of whatever troubles there was, if there was any, outside of what occurred there in the
19 mine, between these parties?

A. No, sir; I heard they had a fuss that morning. I don't know anything about that.

Q. Did you ever hear him curse this boy or his brother?

A. I heard him abuse his brother in the pit.

Q. More than once?

A. Only one time; we were sitting out on the——

Q. Do you know anything about this boy going to hunt an officer that day, before this occurred?

A. I didn't know it until after it done occurred.

Q. You didn't know it at the time?

A. No, sir; Mrs. Watson told me——

The DISTRICT ATTORNEY. Never mind that. We would rather have it come direct.

Mr. BARNES (of counsel for defendant). Did you see anything of any difficulty between Pete and this defendant there about the post-office before this shooting?

A. No, sir.

Q. You did not see that if it occurred?

A. No, sir.

Q. Do you know how many loads there were in that pistol?

A. There wasn't nary one in it when Mr. Hendricks got it. There was not but three in it in the first place, I think.

Q. You say there was no loads in this little 32 pistol. You call it a little 32; I suppose you mean it was a small pistol and a 32?

A. Yes, sir.

Q. You do not know what make it was?

A. No, sir; I do not. I think, though, it was an American double-action. I won't be certain about it.

Q. The defendant fired three times, did he?

A. Yes, sir.

20 Q. Mr. Hendricks took charge of him and he took charge of the pistol, and there was no loads in the pistol?

A. No, sir.

Q. Then, if he had turned the pistol on you it would have been an empty one?

A. Yes, sir; but I didn't know it at the time.

Q. You state now that he started to put the pistol down, you caught him some way, and he kind of turned the pistol, and you thought, yet you were not absolutely certain, that he turned it on you?

A. He had it turned towards me. When I seen what he was up to I grapped it, and I happened to run my hand right behind the trigger and the guard, and I don't know whether he was aiming to shoot me or not, or I didn't know.

Q. If it was a double-action pistol could you accomplish anything by that sort of a move?

A. You can get your thumb there.

Q. A man would pull it off so quick——

A. A man has got to get his hand in place before he can pull.

Q. He hadn't pulled, evidently, when you run your hand there?

A. I haven't said he had.

Q. I understand now; I was mistaken; I see you were referring to a hammer instead of a trigger. It is my mistake. How far was the defendant arrested from the place of this shooting?

A. It was as far as from here to the corner of the court-house door, I guess; about 30 steps from where Mr. Hendricks got him.

Q. You took charge of him immediately after the shooting, and you had gone along with him a little ways when you turned him over to Mr. Hendricks?

A. Yes, sir.

Q. When you took charge of him you took charge of the pistol, didn't you?

A. No, sir.

Q. Didn't you take it away from him?

21 A. I had hold of it; I was holding the other arm and Gus Felix got the pistol; he grabbed hold of him and got the pistol away from him.

Q. He was another man who was with you?

A. Yes, sir.

Q. Did he walk along with you?

A. Yes, sir.

The DISTRICT ATTORNEY. You call him Gus Felix; his name is Felix Augustine.

A. I don't know him only by the name of Guss.

Q. Is he here?

A. Yes, sir.

Mr. BARNES (of counsel for defendant). Hadn't this boy just turned around and made a few steps when you run up on him, and grabbed him?

A. I was about as far as from here to the door, I told you.

Q. That is the manner in which you took hold of him?

A. Yes, sir; he got as far as from here to the door before I got to him.

Q. You run up and sort of jumped and grabbed him?

A. Yes, sir.

Q. Did you throw him down?

A. Yes, sir.

Q. You didn't strike him, did you?

A. No, sir.

Q. You just threw him down?

A. Yes, sir.

Q. Just run up to him and jumped on him and threw him down?

A. Yes, sir.

Q. Did he say when you threw him down, "Don't knock me down; I am not going to run off?"

A. No, sir.

Q. Did he say to you, "Don't knock me down?"
A. No, sir.
Q. You don't remember anything of the kind?
A. No, sir; I just threw him down and was on top of him, and I didn't strike him at all or make any attempt to strike him.
Q. You run up suddenly, right after the excitement there, and you jumped on him and threw him down?
A. Yes, sir.
Witness excused.

22 WILLIAM WINGO, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:
Question. What is your name?
Answer. William Wingo.
Q. Where do you live?
A. I am staying at Hartshorne right at the present, and Alderson, together.
Q. Where did you live last November?
A. Alderson.
Q. Do you know the defendant?
A. Yes, sir.
Q. What do you call him?
A. John Gerko.
Q. Do you know how he spells his name?
A. No, sir; I have heard it spelled in several different ways.
Mr. BARNES (of counsel for defendant). It is spelled Gerko; you have it spelled wrong on the indictment.
The DISTRICT ATTORNEY. What nationality is the defendant?
A. I could not say for sure; I have heard it said he was a Hungarian.
Q. Did you know Peter Crabo in his lifetime?
A. Yes, sir.
Q. What nationality was he?
A. I don't know for sure; they call him a Polander.
Q. He passed as a Polander, did he?
A. Yes, sir.
Q. Were you present when Crabo was killed?
A. Yes, sir.
Q. Where was you?
A. I was at the corner of the drug store.
Q. Where had you been just prior to that, just previous to the shooting?
A. In the billiard hall of Bill Craig's.
Q. Were you playing billiards?
A. No, sir; I was not.
Q. You were just simply a looker-on?
A. Yes, s'r; that is all.

23 Q. State, now, the first thing that passed between these two men.
A. Well, sir; as well as I remember, Gerko came to the door of the billiard hall——
Q. Was the door open or shut?
A. Open.

Q. What kind of a position did he take at the door when he came there?

A. As well as I remember, he was something in this position [standing up].

Q. Was there a step to the door?

A. No, sir; I believe not—no, sir; there wasn't.

Q. Go ahead.

A. He came up and he said, "Pete, you called me a son of a bitch; I will fix you." That, I believe, was the words that he said.

Q. Go on.

A. He then called Pete out of the room, out of the billiard hall.

Q. What did he say? Use his language, as near as you can.

A. He sais, "Pete, come out." Pete said, "You want to fight, don't you?" And the lad said, "Yes; come on;" just like that; and Pete stepped out around the corner of the drug store, or of the billiard hall—I believe the drug store was in the back of the billiard hall at that time—and John started off by the billiard hall or by the drug store down by the railroad.

Q. Started down towards the railroad?

A. Yes, sir.

Q. That is, the defendant?

A. Yes, sir. He says to Pete, "Come on." Pete said, "No; we will fight right here." John said, "All right; we will fight right here, will we?" And he started back then to Carbo, and as he started back he threwed his hand back to his pocket. I had never noticed his hand there before.

Mr. BARNES (of counsel for defendant). Who did, the defend-
24 ant, or who?

A. Yes, sir; the defendant, John Gerko. He threw his hand back, and as he walked up he repeated these words some two or three times.

The DISTRICT ATTORNEY. What did he say?

A. "We will fight right here, eh?" or "Will we?" and that is all I remember of him saying. He commenced shooting then as he got up in space of about 5 feet of Garbo.

Q. How did he shoot the first shot?

A. He drew his pistol, and the first shot it went off almost as he got it out of his pocket, it went off in the air; just as he threw it it fired almost, and the second shot was a little bit lower, and the third shot struck Peter Carbo in here somewhere [showing in the head].

Q. On the left side?

A. Yes, sir; I believe so.

Q. What became of Peter?

A. Pete fell, and he didn't say anything, or groan, that I heard. He just turned about half around and fell on the ground.

Q. Did he speak during the time the defendant was shooting at him?

A. No, sir.

Q. Or during the time the defendant was shooting the pistol?

A. No, sir.

Q. What was he doing at that time?

A. He was kind of dodging his head was all, just ducking his head the least bit.

Q. Then you say Peter Carbo fell without speaking?

A. Yes, sir.

Q. What became of the defendant?

A. I could not tell you; I did not see him from that time until I saw him under arrest. I didn't watch after him. I went back through the drug store for the doctor. The doctor was in his office, and——

Q. Did the deceased have any arms?

25 A. I could not say; I did not see any arms on him.

Q. You saw no arms on him?

A. No, sir.

Q. Did you hear Pete ask the defendant anything about whether he was armed?

A. I don't remember as I did; I don't remember; I don't believe I did.

Q. After Pete fell you went for the doctor?

A. Yes, sir.

Q. Do you know whether he was alive or dead when you went off?

A. He was alive; that is, he was breathing when I got back with the doctor, and I suppose he was alive if he was breathing.

Q. How far did you go for the doctor?

A. Just through the drug store; I don't know the length of the drug store; good big building. His office was in the back end of the drug store.

Q. You didn't see Leachman catch the defendant?

A. I did not.

Q. Where was he; what did he do immediately afterwards; where was he when you left—the defendant?

A. I told you I didn't see him after the shooting of Pete Carbo. I don't remember of seeing him at all after the man fell. I was watching Pete as he fell, and as soon as he fell, and I stood for a second, probably, then I turned and went into the drug store, and I didn't see Gerko that I remember of.

Q. You left at once, and you do not remember what became of the defendant then?

A. No, sir.

Q. Did I ask you how the deceased had his hands?

A. No, sir.

Q. How did he have them?

A. He had one hand—I don't remember, I think it was his left hand—in his bosom, something similar to this [indicating]. I didn't notice particularly, but something like that.

26 Q. Do you know where his right hand was?

A. I do not; I think, though, it was something like this, on his back [indicating by putting behind *behind* on back].

Q. Do you know what his habits were when standing around, how he held his hands?

A. I had noticed him some few times, and I heard the other boys talking about the habit he had of carrying his hand around in his bosom.

Mr. BARNES (of counsel for defendant). Never mind that.

The DISTRICT ATTORNEY. Do you know that yourself? Did you notice that?

A. Yes, sir; only for a few times, though. I never paid much attention to him at any time.

Q. Are you any relation to either one of them?

A. No, sir; not that I know of.

Cross-examination:

Mr. BARNES. Which hand did you say that he had in his bosom?

A. I think it was his left hand. I don't say for sure which hand.

Q. Did either one of them speak after the shooting commenced?

A. No, sir; not that I heard.

Q. If I understand you, did you say at first that he went out of the back door of the drug store?

A. I did not.

Q. Or that the defendant went towards the end of the drug store? How was that expression?

A. How do you mean?

Q. After you say that he was out of the door there?

A. After they went out of the door?

Q. Yes, sir.

A. They first went out of the front door.

Q. Onto the street?

27 A. Yes, sir. And then Gerko went down to the side of the building to go to the railroad.

Q. Then he would have go around that corner, wouldn't he, of the front?

A. Of the front; yes, sir.

Q. That would throw him to one side of the drug store?

A. Yes, sir; by the side.

Q. How far back that way did he go, or did you notice?

A. I suppose some 15 or 20 feet, as well as I remember now.

Q. Anyway, he went back part way towards the drug store; and going towards the railway, he would have to go down the side of the drug store?

A. He would simply have to go around the corner of the building.

Q. Was there another street come along there?

A. No, sir.

Q. Wasn't there a street came in there and joined——

A. The billiard hall was fronting the main street, and in fact, the only street.

Q. Did I understand you to say the billiard hall and drug store were in the same building?

A. Yes, sir; as well as I remember, they were.

Q. The drug store was in the rear part of the building?

A. Yes, sir.

Q. And the billiard hall in the front part?

A. Yes, sir.

Q. Didn't two streets come together there, or was there just an open space along side of the drug store?

A. There is a small open space; it is just a big road—of course, it is a kind of a street.

Q. I thought there was a street; it is near the post-office there?

A. There is a kind of a street.

Q. It is not laid off in streets, but it is treated as streets?

A. Yes, sir.

28 Q. He had started on to go around by the drug store, and he said to him to come on, and Pete said to him—no; I believe you have said he said "we will fight right here;" how far apart were they then?

A. I suppose about 15 or 20 feet apart at the time Pete said "we will fight here."

Q. Did you see where Pete had his hand at that time, or where he put it?

A. If I am not mistaken, as he walked out of the billiard hall he had his hand in his bosom, and it remained that way.

Q. Were you looking at him all the time; you could not say positive?

A. No, sir; I could not say positively.

Q. Because the man walked off with his back to you?

A. Yes, sir; that is what I say; I can not say positive.

Q. Of course, you were observing both of them, and you can not say whether he kept it there all the time or not; you think that he had it there when he went out?

A. Yes, sir.

Q. Did you see him move his other hand in any way?

A. No, sir; not that I remember of.

Q. Did you say that he had the other hand behind him, or put it behind him at any time?

A. That is my belief, that he had his hand behind him, something like this, but I would not be sure.

Q. Or you would not be certain just when he put it there?

A. No, sir.

Q. But he had it behind him something like this?

A. Yes, sir.

Witness excused.

29 FELIX AUGUSTINE, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Your name is Felix Augustine?

Answer. Yes, sir.

Q. Where did you live last November?

A. Alderson.

Q. Do you know the defendant in this case, John Gerko?

A. Yes, sir.

Q. Did you know Pete Carbo in his lifetime?

A. Yes, sir.

Q. Were you present at the time he was killed?

A. Yes, sir.

Q. Where were you just prior to his being killed?

A. I was in the billiard hall.

Q. Whose hall was it?

A. I can not tell the name.

Q Now, then, you may go on and tell what happened there. You were in the billiard hall?

A. Yes, sir.
Q. What happened?
A. Pete Carbo was in the hall before Gerko came, and he said——
Q. Where did he come from?
A. He come to the door.
Q. What did he say?
A. He said, "You called me a son of a bitch; come on," and he said the first thing, "Oh well," and he said, "Come on, come on; you called me a son of a bitch," and Pete Carbo he turned and he said, "Do you want to fight," and he said, "Yes, I want to fight," and Pete Carbo just turned around going outside, and when he got out there——"
Q. Did Pete say anything to him as to whether he had any arms or pistols?
A. Yes, sir; he said, "Have you got any knife or pistol."
30 Q. Pete asked Gerko?
A. Yes, sir; Gerko said, "That is none of your business," and when he got his pistol he tried to get Pete behind the store, behind the company store, and Pete said, "No, I won't go out there; here is a good place to fight," and that fellow, he was about 15 or 20 steps, and he just turned around and put his hand back here, like that, and pulled out his pistol and shot three shots, one up in the air, and another one was a little lower, and the third one he pulled his pistol, like that, and hit him in the head, in the left side of the head. The second shot he fired Pete tried to turn and tried to run away, and he shot again and shot him here.
Q. That is how he come to get shot in the left side of the head; he turned?
A. Yes, sir.
Q. Did Pete fall?
A. Yes, sir.
Q. Did he say anything while he was shooting at him?
A. No, sir.
Q. Did the defendant say anything while he was shooting?
A. No, sir.
Q. What became of Gerko?
A. Jim Leachman caught him, and Gerko got his pistol when he got him on the ground, and I come up there and took the pistol out of his hand.
Q. Were all the shots fired out of it, or were there any left?
A. No shots left.
Q. Did you hear him say anything just at that time?
A. No, sir; not at that time. He started to take him to the marshal's house; Mr. Hendricks did, and he said when he started that he had called him a son of a bitch.
The COURT. The defendant when he started to go there said the deceased had called him a son of a bitch?
A. Yes, sir.
31 The DISTRICT ATTORNEY. When they started to take him up to the marshal's after the shooting, he said that the deceased called him a son of a bitch?
A. Yes, sir.
Q. Did you see Carbo after that?

A. Yes, sir; I helped take him up home.
Q. Did he have any arms about him?
A. I didn't see anything about him.
Q. You saw no arms of any kind on him?
A. No, sir.
Q. Do you know who dressed him?
A. No, sir.
Q. Where did you take him?
A. To Williams's house, I guess.

Cross-examination by Mr. THOS. H. BARNES:

You don't know where they took him. Did he not use to board at Davis's? and that was Davis's, was it not?
A. Yes, sir.
Q. Not Williams's, but Davis's?
A. Yes, sir.
Q. You made a mistake?
A. Yes, sir.
Q. Where is that pistol, do you know?
A. The marshal got it.
Q. Leacham went up and jumped on the boy right close to where this shooting occurred and threw him down, and you came up about that time?
A. Yes, sir.
Q. And you got his pistol?
A. Yes, sir.
Q. He had started to put it in his pocket before that?
A. Yes, sir; he got it in his pocket all right, and when Jim ran up——
32 Q. Jim ran up and threw his arms around him this way when he was putting it in his pocket?
A. Yes, sir.
Q. You came up about that time and Jim threw him to the ground, and then you got the pistol?
A. Yes, sir.
Q. And it was empty?
A. Yes, sir.
Q. How many chambers to the pistol? How many times could it have fired if it was loaded all around?

The COURT (to the district attorney). Have you the pistol?

The DISTRICT ATTORNEY. Not yet, your honor. I have sent over to the commissioner's office to see if it was left there.

Mr. BARNES (of counsel for defendant). Was it a five or six shooter?
A. I can't tell.
Q. You say it was fired three times and no cartridges left in it; do you know how many times it would have fired if it had been loaded all around?
A. No, sir; I don't know about that.
Q. It would have fired more than three times, would it not?
A. I know it fired three times; I don't know whether it was a five or six shooter.
Q. You never saw a three shooter, a revolver with only three chambers?
A. No, sir.

Q. I guess it would shoot about 6 times, would it not?
A. I don't know whether it was a 5 or 6 shooter.
Q. They run from 5 to 7, do they not?
A. I don't know anything about that. I gave the pistol to Mr. Hendricks and that is the last I saw of it.
Q. Was it a little bit of a pistol?
A. Yes, sir.
Q. A little longer than your finger?
A. Yes, sir.
Q. There were no other loads in it?
A. No, sir.
33 Q. How many of you were in the billiard hall there, do you remember all that was there?
A. There was me and Jim Leachman, and a fellow they call him John—I don't know his second name—and Wingo, and the boss of the billiard hall.
Q. What time of day was this shooting?
A. The first of November, I believe.
Q. What time in the morning was it?
A. About 9 o'clock, or somewhere about there.
Q. You were not at work in the mines that day?
A. It was a big holiday.
Q. A holiday, was it?
A. Yes, sir.
Q. What day of the week was it? Was it Saturday?
A. It was Monday, I guess.
Q. Was it Saturday or Monday?
A. Monday, I guess.
The DISTRICT ATTORNEY. The almanac shows it was Tuesday.
Mr. BARNES (of counsel for defendant). It was the first of the month?
A. Yes, sir.
Q. It was the first whether it was Monday or Tuesday, and it was a holiday?
A. Yes, sir.
Q. How long had you known Pete?
A. Oh, I had known him not much. I never talked with him at all. We worked in the same mine. I saw him there every morning, and I saw Gerko, but I never talked to him at all.
Q. The deceased was a good deal larger man than the defendant, was he not?
A. Yes, sir; he was a big man.
Q. Weigh 200?
A. I guess he would weigh more than that.
Q. You wouldn't guess this defendant to weigh more than 130 to 140 pounds, would you?
A. I don't know what he would weigh.
Q. How large a man was he, did he look to be?
34 A. He looked like a nice man——
Q. How old did he look to be?
A. About 35 or 45 years old.
Q. He was a good deal older man than this boy here?

A. Yes, sir.
Q. And a big man?
A. Yes, sir.
Q. Did you see any trouble between these men at the post-office just before this?
A. No, sir.
Q. Did you know about any trouble they had in the mine, or this boy's brother?
A. I heard about it.
Q. You didn't know yourself?
A. No, sir.

Redirect examination:

The DISTRICT ATTORNEY. You say when they came out of the billiard hall the defendant walked ahead and tried to go in around the side of the house?
A. Yes, sir.
Q. How far did he go?
A. About 9 or 10 steps ahead.
Q. When he drew his pistol, how far apart were they at that time?
A. About 9 or 10 yards, and when Carbo said, "If you want to fight here is a good place to fight;" and then he took out his pistol.
Q. Did he walk back?
A. No, sir.
Q. They were that far apart when the shooting occurred?
A. Yes, sir; about 9 or 10 yards.
Mr. BARNES (of counsel for defendant). The defendant did not walk back?
(No response.)
Witness excused.

35 THOMAS WHITNEY, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. State your name.
Answer. Thomas Whitney.
Q. Where did you live last November?
A. Alderson, Choctaw Nation, Indian Territory.
Q. Do you know the defendant?
A. Yes, sir.
Q. Did you know Peter Carbo in his lifetime?
A. Yes, sir.
Q. Were you present at the killing of Carbo?
A. Yes, sir.
Q. Were you in the billiard hall or on the outside?
A. I was on the outside.
Q. You may go on and state all you know about it.
A. I had a restaurant there that was down on the back street, and I was going up to the meat market, and just as I came around the corner up in front of the street—you understand this is a back street—onto the main street, what might be, I looked over and saw Mr. Carbo and Mr. Gerko coming out of the billiard hall.

Q. Then what?

A. Well, just as they came out, I suppose they were standing perhaps 15 or 20 feet apart when the shooting commenced; three shots were fired.

Q. I want you tell all about it, what you saw.

A. The first two shots, I think, by the looks of the smoke went over his head.

Q. You have not stated who shot, or anything about it?

A. Mr. Gerko was doing the shooting.

36 Q. Did you see him draw the pistol?

A. No, sir; I didn't see him draw his pistol; he had his pistol in his hand when I saw him.

Q. He was fifteen feet away?

A. Yes, sir.

Q. Gerko commenced to shoot?

A. Yes, sir.

Q. He commenced the shooting?

A. Yes, sir.

Q. Go ahead.

A. And he fired three shots, the first two went over his head, and the last time Mr. Carbo kind of stooped down, kind of sideways, like this, and the shot *him* him three-quarters of an inch above the ear. The doctor measured it. He dropped and then Mr. Leachman and another man had hold of him, and I said, "You hold him until I go over and get Mr. Hendricks." Mr. Hendricks is a marshal there. I rushed over and got Mr. Hendricks—I met him coming over—and after Mr. Carbo was taken to the hotel we took Mr. Gerko away from there.

Mr. BARNES (of counsel for defendant). Which side of the head was Carbo shot on?

A. On the left side, three-quarters of an inch above the ear. The doctor and I measured it. I laid him out. The coal company came to me to take charge of the body.

The DISTRICT ATTORNEY. You say at the third shot the deceased fell?

A. Yes, sir.

Q. What did you do?

A. Well, I run right over to him as soon as I could; that is, to Mr. Carbo.

Q. Was he alive or dead when you got to him?

A. He was dead.

Q. What had become of the defendant?

A. Well, at that time he was there; they had his coat off, and Mr. Leachman and Mr. Wingo had hold of him, and then Mr. Hendricks came there.

Q. They had hold of him when you came up?

A. Yes, sir.

Q. Wingo and Leachman?

A. Yes, sir.

37 Q. Did you see them take the pistol from him?

A. No, sir I didn't see them.

Q. Do you know the pistol, or would you know the pistol if you would see it?

A. I saw it afterwards.

Q. Is this the pistol I now hand you?

A. I could not swear; it looks very much like it.

Q. Do you know how many loads it had in it?
A. Three loads.
Q. It has three empty hulls, and three empty chambers in it now, has 't not?
A. Yes, sir.
Q. Did you examine the deceased?
A. Yes, sir.
Q. You helped dress him.
A. Yes, sir.
Q. What did you do with him after you went up there to him?
A. The foreman of the mine came to me and asked me if I would take charge of the body and see that he was dressed.
Q. What did you do with the body then?
A. We went and got a kind of a door like and carried him down to Mrs. Davis's, and then I came up to the store and got some underw're for him.
Q. Did you examine him to see if he had any arms on his person?
A. Yes, sir.
Q. Did he have any?
A. No, sir; he had a little pass book in his pocket was all he had—a little memorandum book.
Q. No knives or pistols or anything of the kind?
A. No, sir; I had Mrs. Davis go through his pockets.
Q. Were you present and saw it done?
A. Yes, sir.
Q. Do you know what became of the defendant after that, what was done with him?
A. Yes, sir.

Q. I will ask you, when you first went up to where he was, right
38 at first when you got there, did you hear the defendant say anything?

A. He just made the remark as Mr. Hendricks and I came up together; we came on a run you might say, as fa't as we could, he said, "This man called me a son of a bitch."
Q. Pointing to who?
A. Pointing to the man who was laying on the ground dead.
Q. Pointing to Carbo, who was laying on the ground dead?
A. Yes, sir.
Q. "This man called me a son of a bitch." Is that all he said?
A. Yes, sir.
Q. That is all you remember of him saying at that time.
A. Yes, sir.

Cross-examination by Mr. THOS. H. BARNES:

How far away were you when you saw the shooting; that is, if I understand you now, your shop was on an alley, or side street, or back street?
A. Yes, sir.
Q. You were going to the butcher shop that morning from your place of business, and as you reached the main street you saw these parties and you saw this occurrence?
A. Yes, sir.

Q. How far away were you; these are not streets here, but pass ways called streets?

A. Yes, sir; I was coming up kind of diagonally across like.

Q. Which way were they from you, north, south, east, or west?

A. They were standing right in front of me. I was face to face with them as I came up the street.

Q. How far 'way were you?

A. I expect perhaps the length of this court room; just across the street, perhaps a little further.

39 Q. You were 100 feet, I suppose, or more?

A. Yes, sir; I suppose so; about 100 feet

Q. You didn't hear anything pass between them; you did not hear what was said?

A. No, sir; I didn't hear anything that was said.

Q. They were 15 or 20 feet apart when this man shot?

A. Yes, sir.

Q. Each of them standing still?

A. Yes, sir.

Q. Did you notice the gestures of the man who was shot, whether he put his hand in his bosom or hip before he was shot?

A. No, sir.

Q. You didn't notice anything about his actions?

A. No, sir; I didn't notice him only when he was laying dead.

Q. Did you see him walk to the shooting, the place where he was shot?

A. No, sir; perhaps he might have taken a step or two.

Q. You don't know how he had his hands then?

A. I saw him have his hand up to his bosom like this.

Q. He might have taken a step or two after you noticed him?

A. Yes, sir.

Q. Do you know whether he had the other hand behind him this way?

A. No, sir; I can't say.

Q. You can not say which hand he had up to his bosom, can you?

A. I don't think I can; I think it was the left hand; I could not say positive.

Q. You don't know where the other hand was?

A. No, sir; it was kind of an exciting moment.

Q. Did you examine the pistol after that?

A. No, sir.

Q. Did you have it in your hand?

A. I think I had it in my hand; Mr. Hendricks handed it to me.

40 Q. There were no loads in it?

A. No, sir.

Q. Is that a 32-calibre pistol, or do you know pistols enough to know about that?

A. I am not very well posted about them.

Q. I thought you had been down in the Indian country long enough to carry one of them?

Q. I never carried one; I don't think it is safe.

Q. You don't know anything about any previous difficulties between these parties, of your own knowledge?

A. No, sir; I do not.

Witness excused.

41 FELIX AUGUSTINE, being recalled upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Examine this pistol I now hand you and see if it is the pistol you took from the defendant?

Answer. Yes, sir; that is the one.

Q. Did it have these three empty hulls in it it has now; were they right together that way?

A. Yes, sir; they were together.

(Pistol here introduced in evidence by the district att'y.)

Mr. BARNES (of counsel for defense). You say it had these hulls in it just that way?

A. Yes, sir.

Witness excused.

42 JOHN RUTLEDGE, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Your name is John Rutledge?

Answer. Yes, sir.

Q. I believe you lived at Anderson last November, didn't you?

A. Yes, sir; I have been living there ever since I have been in this country.

Q. Were you present at the time the defendant killed Carbo?

A. Yes, sir.

Q. Where were you?

A. I was in Bill Craig's billiard hall.

Q. Go on and tell us what you know about it.

A. Well, me and Jim Leachman were playing a game of billiards, and Pete was in there, the fellow that got killed, and Gerko came in and called Pete, and told him he wanted to see him, and he said, "Pete, you called me a son of a bitch; I want to see you." Pete walked on to the door, and advanced on to the ground, and I advanced on to the door. I stepped out in the yard, and they got just to the corner of the building——

Q. You saw the defendant come to the door?

A. Yes, sir.

Q. He said, "Pete, you called me a son of a bitch?"

A. Yes, sir.

Q. He was talking to Pete Carbo, was he?

A. Yes, sir.

Q. "Pete, you called me a son of a bitch, and I want to see you," I believe is your expression?

Q. Yes, sir.

A. What did Pete say?

A. Pete said, "You want to fight, do you."

43 Q. What did Pete say to him in the hall when he said to Pete in the hall, "Pete, you called me a son of a bitch, and I want to see you;" what did Pete say right there, if anything?

A. Pete never said anything that I remember of. The first word I remember Pete saying, he said, "You want to fight; you have got a knife

or a pistol on you," and Gerko never said anything, whether he had or hadn't. And they advanced then to the corner of the building, and John pulled his gun then and commenced shooting.

Q. Where did he pull his pistol from?

A. From his hip pocket.

Q. And commenced shooting; how many shots did he fire?

A. He fired three shots.

Q. How did he fire them?

A. He fired the first shot pretty near straight up, and the next one down lower a little, and the third one he hit Pete in the side of the head above the ear, in the temple here.

Q. How did he hold his pistol?

A. Drew it from his hip pocket, fired first straight up about that way, and then about this way, and then this way [indicating].

Q. When he shot Pete in the head what did Pete do?

A. Pete fell dead on the ground.

Q. What did the defendant do?

A. He turned around and started to walk off, and Leachman caught him and threw him down; run up behind him as he turned around and walked off.

Q. Leachman caught him?

A. Yes, sir.

Q. Then what?

A. He threw him down on the ground, and him and Guss—I don't know his other name, he is an Italian—taken the gun away from him.

44 Q. Took the pistol away from him?

A. Yes, sir.

Q. Did you hear him say anything at that time?

A. No, sir; when the marshal got there, that is Mr. Hendricks, he said, "He called me a son-of-a-bitch," and he says, "I have fixed him."

Q. That is when the marshal came?

A. Yes, sir.

Q. I suppose the defendant was put under arrest?

A. Yes, sir.

Q. What became of the man Mr. Carbo, the dead man?

A. Mr. Stumbo, the foreman of the mines, he came and made arrangements and carried him away to where he was boarding.

Q. Over to Davis's?

A. Yes, sir.

Q. Did you examine him or see him examined?

A. No, sir; I did not stay there to see him examined at all.

Q. Did you see any arms or pistols or anything upon him?

A. No, sir; I didn't see any arms at all.

Cross-examination by Mr. THOS. H. BARNES:

Q. You didn't help dress him?

A. No, sir.

Q. Who did; do you know?

A. No, sir; I do not. There was several boarders there; I don't know who dressed him.

Q. Do you know what arrangements were made to dress him—look after his remains?

A. No, sir; I do not. His own countrymen took charge of him.
Q. You are an American?
A. Yes, sir.
Q. You do not belong to the race of any of these people?
A. No, sir.
Q. Do you work in the mines there?
A. Yes, sir.
45 Q. Are you from a foreign country, or raised in this country?
A. No, sir; I was born and raised in the State of Tennessee.
Q. You worked there in the mines?
A. Yes, sir; I am a coal digger.
Q. Who were you playing billiards with there that morning?
A. Jim Leachman.

The DISTRICT ATTORNEY. He is the first witness examined by the Government.

Mr. BARNES (of counsel for defense). When these parties went out you went out in the yard. Do you mean you went out the back way?
A. No, sir; we all went out of the front door.
Q. Were you right around where this shooting occurred?
A. I was in about 8 or 10 feet of it.
Q. Why didn't you try to stop it?
A. It wasn't any time to do anything.
Q. You have given a set of circumstances here that he came up and notified the man in that way; invited him out. Did you go out expecting to see a fight?
A. I didn't think there was going to be any fight. I thought it was just a bluff.
Q. You didn't know what happened before that?
A. No, sir; I didn't know what sort of character it was.
Q. If you had been looking for a fist fight you would have thought it would be an unequal contest? This other man was a larger man than this boy, was he not?
A. Yes, sir; he was as large again, I guess.
Q. Much older?
A. I don't know his age. He was about as large a man as there was in the camp.
46 Q. Were you acquainted with him?
A. I knew his name, was all. He worked there in the same mine I did.
Q. You say that when he told him that he had a knife or a pistol he didn't answer one way or the other?
A. No, sir.
Q. He didn't say it was none of his business?
A. No, sir; if he did I don't remember it. I won't say he didn't say it.
Q. You hadn't seen any difficulty between them that morning before that?
A. No, sir; I heard afterwards they had a difficulty.
Q. You didn't know anything about it at that time?
A. No, sir.
Q. Or how long before it had been, or anything of that sort?

A. No, sir; I didn't know what had been the trouble at all.

Q. How far apart did you put these men at the time that shot was fired; within fifteen or twenty feet, I believe you say?

A. No, sir; I didn't say.

Q. Give your version of it.

A. I was about 8 or 10 feet from them, and they must have been standing—they were in about 6 or 8 feet of one another.

Q. Do you think they were that near?

A. I think they were; they were standing up pretty close together.

Q. You put them in 6 or 8 feet of each other?

A. Yes, sir; somewhere along in that distance.

Q. Did you see where this man had his hands when he was shot?

A. He had one of his hands on his bosom; I could not say which hand it was.

Q. Did he have one behind him?

A. Yes, sir; he had one hand back this way and the other up this way. He just had on a coat and no vest, or nothing, and I think he had his hand in between his top shirt and undershirt.

47 Q. He had on a thick woolen shirt; it was winter time?

A. Yes, sir.

Q. You think he had his hand in between his two shirts?

A. Yes, sir.

Q. And one hand behind him?

A. Yes, sir.

Q. You can not say which hand was behind him or which was in his bosom?

A. No, sir.

Q. They were in 6 or 8 feet of each other?

A. Yes, sir

Witness excused.

Government rests.

48 Thereupon the defendant, to maintain the issues upon his part, produced the following witnesses, to wit: Miss Nannie Dobbins, John Wagoner, John Brusky, John Silluski, Mike Gourko, Angello Duca, Geo. W. Anderson, who testified as follows:

49 *Testimony offered by the defense.*

Miss Nannie Dobbins, having been duly sworn upon behalf of the defense, was examined by Mr. N. L. Marmon, and testified as follows, to wit:

Question. Where do you live?

Answer. Alderson, Indian Territory.

Q. Do you hold any position there?

A. I am postmaster.

Q. I will ask you if you know the defendant, John Gerko?

A. Yes, sir.

Q. How long have you known him?

A. I guess I have known him about three months before the killing.

Q. Did you witness the killing?

A. No, sir.
Q. You did not see that?
A. No, sir.
Q. Now, I will ask you to state if you saw the defendant and Peter Carbo just a short time before the killing did occur?
A. Yes, sir.
Q. About how long?
A. As near as I remember, about 25 or 30 minutes.
Q. Where did you see them?
A. Just in front of my office; I suppose 8 or 10 feet from the window.
Q. I will ask you if you heard any difficulty between them there?
A. Yes, sir.
Q. On the street in front of the post-office?
A. Yes, sir.
Q. And your window of the post-office is on the street so you can see?
A. Yes, sir.
50 Q. I will ask you what size man was Carbo?
A. He was a large man.
Q. A very large man?
A. Yes, sir.
Q. Just state to the jury what occurred there, as near as you can get at it; tell all that occurred in front of the post-office.
A. The first I noticed them they were talking there; they were talking in their language, and I didn't understand what they said only when Mr. Carbo would swear and call him names and make threats that he would hit him or something of the kind, and shook his fist right in his face, and I was afraid he was going to hurt the boy, and I spoke to Mr. Anderson that was working in the store, and I said, "Pete is going to kill John, I am afraid——"
The DISTRICT ATTORNEY. Don't tell that; that won't do.
Mr. MARMON (of counsel for defendant). You need not tell what you said, but just tell what happened outside, what they were doing.
Mr. BARNES (of counsel for defendant). Their actions and language.
Mr. MARMON (of counsel for defendant). Pete was shaking his fist right in his face, and threatening to kill him?
A. I didn't say that, because I didn't understand their language only when they were swearing.
Q. He was swearing, using bad names?
A. Yes, sir. The boy did not show any disposition to want to quarrel with him or want to fight; he would step back as much as two or three steps away, and Pete he would follow him up and shake his fist in his face, and the boy went on; and as he came back I spoke to John, the defendant, and asked him not to have any trouble there by the office,
51 and he said he wasn't going to; he said, "I have just gone to get a marshal to come and have him arrested," and he said, "I will wait until the marshal comes home."
Q. Was there anything else occurred there?
A. No, sir; not that I saw.
Q. Where were you at the time of the shooting?
A. I had gone down to where I lived.

A. No, sir; I didn't know what had been the trouble at all.

Q. How far apart did you put these men at the time that shot was fired; within fifteen or twenty feet, I believe you say?

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Q. Do you think they were that near?

A. I think they were; they were standing up pretty close together.

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A. Yes, sir; somewhere along in that distance.

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A. Yes, sir.

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51 and he said he wasn't going to; he said, "I have just gone to get a marshal to come and have him arrested," and he said, "I will wait until the marshal comes home."
Q. Was there anything else occurred there?
A. No, sir; not that I saw.
Q. Where were you at the time of the shooting?
A. I had gone down to where I lived.

Q. That was about 25 or 30 minutes before the shooting that this difficulty occurred?

A. Yes, sir; as near as I can remember.

Q. I will ask you if you know the general reputation——

The DISTRICT ATTORNEY. She could not know the reputation of a man in three months.

Mr. MARMON (of counsel for defendant). How long have you known Pete Carbo?

A. I wasn't personally acquainted with him.

Q. How long had you known him about there, known of him?

A. Three or four months.

Q. Do you know his general reputation there for being a turbulent, bad man?

The DISTRICT ATTORNEY. Of course that is not competent now at this state of the proceedings; there is not*n*ing yet to show any—— Well, I will let it go in, and your honor can instruct the jury in regard to it.

Mr. MARMON (of counsel for defendant). Do you know what his general character was—general reputation there—for being a quarrelsome, overbearing man?

A. I have heard him spoken of in that way.

The DISTRICT ATTORNEY. That is not the question.

52 The COURT. You must answer if you know how he is generally regarded by the people there, not that you have heard him spoken of yourself. The man is dead, and of course we want to get at the real thing, not what a few persons may have said about him, and after the killing, perhaps. It means, do you know how the people generally regarded him as a man of lawless and desperate character? You can not testify as to character unless you know how the people generally regard him. You can get that information by hearing them talk, and before this occurrence, of course, and not after the occurrence. You can not consider anything you heard after the occurrence. How he was received in the community by the people generally, and not by a few of the people, but enough to make up the general sentiment of the community. Now, are you able to answer you know how the people generally regarded him; that is, before the occurrence?

A. Before the killing I have heard him spoken of——

The COURT. That does not answer the question. I suppose you have heard me spoken of as a terrible monster up in that country. You must say how the people generally regard him. Do you know how they generally regard him?

A. No, sir.

Q. You do not?

A. No, sir.

Q. Then you are not competent to testify on that point. That is the rule, and I think it ought to be rigidly enforced in a case where a man is in his grave.

Mr. BARNES (of counsel for defendant). I do not understand your honor to hold that she must have seen and talked to everybody?

The COURT. She must have known the sentiment of the people generally in that country. There has never been a man killed in
53 that country, when the man who killed him was tried in this court, but that it is sought to establish that the man killed had a charac-

ter as black as night. This witness is an intelligent lady, and she says she does not know how the people generally regard his character in that respect. She must answer that in the affirmative before she can answer the other question.

Mr. BARNES (of counsel for defendant). You can only say you heard it spoken of. You can not say what the general sentiment of the community is. You do not have to talk to everybody in the community, but you must be able to know in some way what that sentiment is, or to know how the man was received in the community in such a way as to say whether you could say what that character was.

A. All I know of the man——

The COURT. You must not state what you know; you must state, if you state at all, what the general public sentiment was about the man before this occurrence. Do you know that?

Mr. MARMON (of counsel for defendant). Whether he was regarded as a dangerous, desperate man?

The COURT. By the people generally in the community.

The WITNESS. I don't know.

Mr. MARMON (of counsel for defendant). I will ask you if you know the general character of the defendant here for being a peaceable, quiet boy?

The COURT. That is before this affair. Do you know how the people generally regard him?

A. As a peaceable boy?

Q. Do you know that? If you do you answer yes.

Mr. BARNES (of counsel for defendant). You knew him very well, didn't you?

A. Yes, sir.

54 The DISTRICT ATTORNEY. She had only known him three months.

Mr. MARMON (of counsel for defendant). He had interpreted for you?

A. He talks their language well, and when they would come to the office for mail I would ask him about the mail.

Q. How did the general community regard him? Did they regard him as a quiet peaceable boy, or not? Do you know whether they did or not?

A. I don't know how the people regarded him.

The COURT. That is what you are asked about. It is not what you know yourself; it is how the people generally regard a man. His reputation is but a reflex of his character.

Mr. MARMON (of counsel for defense). We do not mean by this question whether you have talked with all the people, or not, but how he was generally received in the community, as a quiet, peaceable, law-abiding boy, or whether he was regarded as a desperado; do you know that? Do you know his reputation in that way?

A. He was peaceable before the killing.

The COURT. It is how the people generally regard him; it is not by what you know. There is only one way we can prove that thing.

The WITNESS. I do not know how the people regard him.

The COURT. This witness is manifestly incompetent on that point. I do not think there is any use of trying to worm anything like that out of

the witness. She has answered twice she didn't know, and there is a very great difference between her knowledge and the knowledge of the community.

Cross-examination:

The DISTRICT ATTORNEY. You have only know the defendant
55 about three months, you say?

A. Yes, sir.

Q. Has he lived there in Alderson longer than that or do you know?

A. I only knew him that long.

Q. You are the postmaster?

A. Yes, sir.

Q. How long have you been postmaster?

A. The 3rd of last June I took the office.

Q. You did not see the killing?

A. No, sir.

Q. You know nothing about that yourself?

A. No, sir.

Q. When they had this quarrel in front of your post-office, you say the deceased Mr. Carbo shook his fist in the face of the defendant, and called him bad names?

A. Yes, sir.

Mr. BARNES (of counsel for defendant). A number of times she said.

The DISTRICT ATTORNEY. He didn't strike him?

A. I didn't see him strike him. I saw him shake his fist right in his face.

Q. You were looking at them?

A. Yes, sir.

Q. And you didn't see him strike him?

A. No, sir.

Q. Then you are able to say he didn't strike him are you not?

A. As far as I seen I didn't see him strike him.

Q. If he had struck him you would have seen him?

A. Yes, sir; if he struck him while he was looking at him.

Q. The defendant had no bruises on him, did he?

A. No, sir; not that I seen.

Q. Are you a single or married lady?

A. Single.

Q. I want to know how long it was after this war of words there in front of your house that you saw the defendant come back when you had this talk with him—how long had he been gone?

56 A. Something near about 10 minutes, maybe.

Q. He went away and was gone ten minutes. There was a marshal in your town, wasn't there, at that time?

A. There was one there, but the boy didn't know it.

Q. You don't know whether he knew it or not; I just merely asked you the question if there was a marshal in that town at that time. It is a small town?

A. Yes, sir.

Q. Who was the marshal that was there?

A. Mr. Hendricks.

Q. When he came back did he have his coat on?

A. I won't say whether he had or not. I don't remember.
Q. Did he have his coat on while they were quarreling?
A. I do not remember.
Q. Did he tell you, when he came back, that he had a pistol?
A. He said he had not.
Q. You asked him?
A. Yes, sir; at that time.
Q. He wasn't armed when he came back to you?
A. No, sir.
Q. You asked him if he had a pistol?
A. Yes, sir.
Q. How come you to ask him that?
A. He went away, and I wondered if he had gone to get a pistol.
Q. He denied having one?
A. Yes, sir.
Q. He said he had not?
A. Yes, sir.
Q. How long was that before the shooting?
A. About 25 or 30 minutes, as near as I can remember.
Q. He told you he didn't have a pistol?
A. Yes, sir.
Q. When they separated which way did the defendant go?
A. I went home at that time and I could not tell you.
Q. You don't know which way Carbo went, either?
A. No, sir.
57 Q. You went home?
A. Yes, sir.
Q. What did you go home for? Did you return to the post-office after you went home?
A. Not until after dinner.
Q. Then he came by your house and not by the post-office when you saw him?
A. No, sir; this was in the post-office——
Q. You do not understand me; you were in the post-office at the time of the difficulty?
A. Yes, sir.
Q. The defendant went off from there?
A. Yes, sir.
Q. Now then, did he come back to the post-office where you were?
A. Yes, sir.
Q. When the defendant went off in what direction did he go from the post-office, just after the quarrel and before he came back?
A. He went east.
Q. Which way did Carbo go?
A. I didn't notice.
Q. Didn't Carbo go towards the billiard hall?
A. I can not say.
Q. In what direction is the billiard hall from the post-office?
A. It is across the street from the post-office.
Q. The defendant went east?
A. Yes, sir.

Q. You say the billiard hall is just across the street from the post-office; what direction is it, north, south, east, or west?
A. It is a little southwest of the post-office, just across the street.
Q. The defendant went east?
A. Yes, sir.
Q. Do you know where he went?
A. He went to where Mr. Watson lived.
Q. Who was Mr. Watson?
A. He was a marshal at that time.
58 Q. Did Watson live in that direction?
A. Yes, sir.
Q. When he came back he came back to the post-office?
A. Yes, sir.
Q. Where he and Carbo had the difficulty?
A. Yes, sir.
Q. And just across the street from the post-office was the place where the shooting occurred, was it not?
A. Yes, sir.
Q. Where did he get his pistol?
A. I don't know.
Q. When he came back you asked him if he had a pistol?
A. Yes, sir.
Q. And then you left and went home?
A. Yes, sir.
Q. Why did you go home?
A. I had some work at home.
Q. Were you not afraid there was going to be a difficulty there?
A. No, sir.
Q. You did not get scared and leave on that account?
A. My brother has a store and we have——
Q. You didn't leave there because you were afraid of a difficulty?
A. No, sir.
Q. You were at home when the difficulty, the shooting, occurred?
A. Yes, sir.
Q. You say you were apprehensive that the defendant had armed himself with a pistol and you asked him if he had one?
A. Yes, sir.
Q. Could you see his hip pockets?
A. I didn't notice.
Q. You don't know whether you could have seen them or not?
A. No, sir.
Q. At any rate you asked him if he had a pistol and he denied having one?
A. Yes, sir.
59 Q. Then where did he go?
A. I don't know; I didn't notice where he went.
Q. Were you talking to him in the post-office or in the street?
A. In the post-office.
Q. He came into the post-office where you were?
A. Yes, sir.
Q. He told you he went after Watson, did he?
A. Yes, sir.

Q. That is what he said to you when he came back?

A. Yes, sir.

Q. You asked him where he had been, did you?

A. No, sir; I didn't ask him where he had been. I asked him if he had a pistol and he said not; that he had gone for Mr. Watson to arrest the man.

Q. You told him you didn't want him to have any trouble there?

A. Yes, sir.

Q. You told him to behave himself?

A. I told him not to quarrel or have any trouble there by the office.

Q. You asked him if he was armed and he said no. He said he had been to Mr. Watson's to get a marshal. Do you know whose pistol this is?

A. No, sir.

Q. Of course you do not know Mr. Watson's pistol. Was Watson in town?

A. He was in Fort Smith.

Q. How long had he been away?

A. I don't know.

Q. He hadn't been there for a good while, had he?

A. I don't know that. I never paid any attention to that.

Q. You knew he was in Fort Smith, and I thought perhaps you knew how long he had been gone?

A. The boy told me that he was in Fort Smith when he came back.

Q. Could you understand what they said when they were quarreling, what they were quarreling about?

A. No, sir; I didn't understand their language.

60 Q. They were talking in some foreign language?

A. Yes, sir.

Q. Do you know of what nationality the defendant is?

A. No, sir.

Q. Is he not a Bohemian?

A. Some say he is a Hungarian; I know only from what the people tell me.

Q. What was Carbo?

A. I believe he was a Russian-Polander; I won't say.

Redirect examination by Mr. BARNES:

You put the space of time from the difficulty there at the office, when the deceased was putting his fist in the face of the defendant and abusing him and he was backing from him, from that time up to the time of the shooting, at 25 or 30 minutes.

A. Yes, sir; as well as I remember.

Q. Now, then, he wasn't gone then, I suppose, very long up to Mr. Watson's, because they had the difficulty, and he had gone away and came back, and you asked him if he had a pistol, and he said no, he had gone to get Watson to arrest the man, and that Watson was in Fort Smith?

A. Yes, sir.

Q. Now, then, how long did it take him to go there and back? After that you went home, and then you heard the shooting?

A. Yes, sir.

Q. I suppose he hadn't been gone very long?
A. No, sir.
The DISTRICT ATTORNEY. She said he was gone about 10 minutes from the time he left until he came back.
Mr. BARNES (of counsel for defendant). I didn't understand that.
The DISTRICT ATTORNEY. You said that, didn't you?
61 The WITNESS. Yes, sir.
Mr. BARNES (of counsel for defendant). He was gone about 10 minutes; you went home; and from the beginning to the shooting was about 25 or 30 minutes?
A. Yes, sir.
Q. You say what made you apprehensive was the conduct of the man towards this boy, the defendant?
A. Yes, sir.
Q. You knew the boy very well, and he had interpreted some for you. You didn't know the other man?
A. Yes, sir.
Q. Was that your brother's store where you had the post-office?
A. Yes, sir.
Q. What sort of a store in there?
A. A grocery store.
Q. You spoke of Mr. Anderson; is he here?
A. Yes, sir.
Q. He is the same gentleman who is here now as a witness?
A. Yes, sir.
Q. He was one of the clerks in the store, was he not?
A. Yes, sir.
Q. When this was going on, he is the one you spoke to?
A. Yes, sir.

Recross-examination by the DISTRICT ATTORNEY:

Did you see the defendant after the shooting?
A. No, sir; I did not.
Q. You never saw the pistol that he had?
A. No, sir.
Q. He never made any threat to you about what he was going to do?
A. He told me that he wouldn't do anything but have him arrested.
Witness excused.

62 JOHN WAGONER, having been duly sworn upon behalf of the defendant, was examined by Mr. N. L. Marmon, and testified as follows, to wit:

Question. Do you know the defendant, John Gerko?
A. Yes, sir.
Q. How long have you known him?
A. I have known him about a year, sir.
Q. Do you belong to the same nationality that he is?
A. Yes, sir.
Q. You talk the same language?
A. Yes, sir.
Q. What language do you speak?
A. Slavos; Slavos and Polish is just the same.

Q. When had you known him?
A. Since I knew him he was always a good boy.
Q. I say where had you knew him?
A. I knew him at Alderson.
Q. Do you know how he is generally regarded there by the people; what his character is for being a peaceable, quiet boy. You have to answer first whether you know that or not?
The COURT. Do you know how the people generally regard him; not what you know yourself, but how the people generally regard him, or did regard him before this killing, not before?
Mr. MARMON. Do you know that?
A. Everybody said he was a nice, good boy——
The COURT. The first question you must answer is if you know how the people generally regarded him as a peaceable, law-abiding man. Do you know that, before the killing; if you know it you say yes; do you know it?
A. Yes, sir.
Q. Was it good or bad?
A. It was always good.
Mr. MARMON (of counsel for defendant). Did you know Peter
63 Carbo in his lifetime?
A. Yes, sir.
Q. How long had you known him?
A. I know Pete Carbo about a year.
Q. What size man was he?
A. He was a big, stout man.
Q. About what age was he, or do you know?
A. I don't know; I think he would weigh about 185 or 200 pounds, somewhere along there.
Q. I want his age and not his weight.
A. I don't know.
Q. He would weigh about 185 or 200 pounds?
A. Yes, sir.
Q. Were you present at this difficulty when it occurred; did you see the trouble at the post-office?
A. No, sir.
Q. Where were you at that time?
A. I was at Krebbs.
Q. You didn't see the difficulty at all?
A. No, sir.
Q. You didn't see any of the shooting?
A. No, sir.
Q. I will ask you if you ever heard Pete make any threats against the defendant here before he was shot?
A. No, sir.
Q. Did you ever hear him say anything about him?
A. I heard him say, but I never saw him have a fuss.
Q. Here is what I want to get at; you do not seem to understand. Did you ever hear him say anything about him, or make any threats against him, what he was going to do?
A. No, sir.

Q. Do you know of any quarrels between them?
A. No, sir; not between these two.
Q. Did you know of any quarrels between him and his brother?
A. Between John and his brother?
Q. Yes, sir.
A. No, sir.
Q. I mean Mico Gerko?
A. Yes, sir; I never heard of any.

64 Cross-examination by the DISTRICT ATTORNEY:

Q. You knew Peter about as long as you did John here?
A. Yes, sir.
Q. You are a Russian Polander?
A. No, sir; an Austrian Polander.
Q. The defendant is an Austrian Polander?
A. Yes, sir.
Q. Pete was a Russian Polander?
A. Yes, sir.
Q. You are all Polanders?
A. Yes, sir.
Q. But some of you belong to that part of Poland that was given to Austria, and the others belong to the part of Poland that was given to Russia when Poland was divided up between these countries after the war they had there?
A. Yes, sir.
Q. You all at one time were one nationality—that is, you were Polanders, or your ancestors were, when Poland was a government of its own?
A. Yes, sir.
Q. You all speak the same language?
A. Yes, sir.
Q. How old is the defendant?
A. I could not tell you.
Q. Is he 22 or 23?
A. Mico told me he is 17 or 18, and his brother here is a year or two older than Mico.
Q. You can not tell much about a man inside of a year?
A. No, sir.
Witness excused.

65 JOHN BRUSKY, having been duly sworn upon behalf of the defense, was examined, and testified as follows, to wit:

Question. Do you know the defendant in this case?
Answer. Yes, sir.
Q. How long have you known him?
A. A little over a year.
Q. Where have you known him?
A. He boards with me about 9 months.
Q. That is at Alderson, in the Indian Territory?
A. Yes, sir.
Q. Do you know his general reputation there—that is, how the people generally regard him as being a peaceable, law-abiding boy?

A. He is a good man for me.

Q. I know, but how do the other people there regard him?

A. They don't say anything.

Q. You don't understand; do they look on him there as being a bad boy or good boy; do you know how they look on him in that regard?

A. He is a good boy.

The COURT. Before the killing did you know how the people generally regarded him in that respect, what they generally thought of him?

Mr. MARMON (of counsel for defense). Do you know how he was received there, how the people generally regarded him?

The COURT. Not now, not since the killing, but before the killing?

A. No, sir; I don't know anything about it.

Mr. MARMON (of counsel for defendant). You do not get the idea. Do you know whether they regarded him as a good boy or a bad boy; do you know how the people generally regarded him?

66 A. No, sir; I don't know.

Q. You have known him up there about a year?

A. Yes, sir.

Q. He boarded with you about 9 months?

A. Yes, sir.

Q. Were you present at the shooting?

A. No, sir.

Q. You don't know anything about that transaction there?

A. No, sir.

Q. Do you know anything about any threats that Peter Garbo made beforehand?

A. No, sir.

Q. Did you know Pete?

A. Yes, sir; I knew him.

Q. What kind of a man was ; what size man, was he big or small?

A. Big man.

Q. That is all you know about it, is it?

A. Yes, sir.

Cross-examination waived; witness excused.

67 JOHN SILLUSKI, having been duly sworn upon behalf of the defense, was examined by Mr. N. L. Marmon, and testified as follows, to wit:

Question. I will ask you to state whether you know anything about this matter or not.

Answer. I can't talk good English.

The COURT. Yes you can; go on.

The WITNESS. That day was a holiday, the first of month of November, and on this holiday all Polish stay at home; I staid at home too. John Gerko was sick. He worked a couple of days, and stay at home three or four; I don't know how many. On that day I staid at home and he staid at home too. He felt bad on that day. About 9 o'clock or half past 9 I go to the post-office, and John Gerko too, and Pete Garbo was standing in front of the post-office, and three other men standing there, and he was talking to them, and I passed him and went inside of the post-office. I heard John say, "Pete, how many cars coal do you say

I stole from you?" and Pete say, "I don't say you stole; you and your brother together work at that place, and I lost about 6 cars." John wasn't mad that time. Pete said he stole about six cars. John left home that morning, he did; he wasn't well; he was sick, didn't work; he had chills and fever; was sick all the time. John said, "You old sucker, I never stole no six cars of coal."

Q. Then what happened?

A. Pete cursed him all the time, called him a son of a bitch all of the time. I don't know how many times he called him a son of a bitch.

68 Q. What else did he do?

A. And Peter said, "You want to fight this morning. Come on here," and John said, "I don't want to fight; I am a sick man; I am going to arrest you; I don't feel well." And he said, "Come on and fight if you want to fight this morning," and he said, "I don't want to fight." John looked behind the store for a policeman or something; he wanted to arrest him, I guess; I don't know. In about ten minutes after this, maybe more, I go in company store, and John go in there too. I was in the company store, and I don't know what John did. I looked for some clothes. John go back in company store. After a couple of minutes, maybe two minutes, I don't know, not too long, John called to me to come on and let's go home. I said, "Lots of time." When I went out John was ready to fight.

Q. When you went out you say that he had started to fight, him and Pete were together there?

A. Yes, sir; that is all I did see.

Q. Tell how you saw the shooting, if you did see it; how did the shooting occur?

A. I didn't see as good as John; John was behind the house. I saw Pete with his right hand behind him and his left hand up here [indicating on breast].

Q. Did you see Pete fall?

A. Yes, sir.

Q. You could not see John?

A. No, sir; I was about 20 feet off. John run away. That is all I saw.

Q. Is the company store on the same side of the street as the billiard hall?

A. Yes, sir.

Q. How far from it?

A. Oh, not far; about 40 or 50 feet.

Q. Both front the same way?

A. Yes, sir.

Q. You do not know how they got together or anything about that; when you came out you saw them together and you saw Pete

69 and heard the shots and saw Pete fall?

A. Yes, sir.

Q. Do you know how or when John got his pistol? What do you mean by running away; you say John run away; how many steps did he go after the shooting?

A. Oh, not far; Jim catched him.

Q. How far was it?

A. Oh, not far.

Q. Could you indicate some object in the court room?

A. About 10 or six feet; something like that; I don't know exactly how many; there was so many people standing there I didn't see good.

Q. He didn't run very far then?

A. No, sir.

Q. You don't know where John got the pistol?

A. No, sir; he didn't say anything to me about it before; I didn't say anything to him.

Q. How was John dressed when he went to the store?

A. Just same like now. He was sick that day too. He was bad sick. He just went to take a walk to the post-office, and he would feel better, you know.

Cross-examination by the DISTRICT ATTORNEY:

The company store is about 40 or 50 feet from the billiard hall?

A. Yes, sir.

Q. On the same side of the street?

A. Yes, sir.

Mr. MARMON (of counsel for defendant). The billiard hall is in the back part of the store, is it not?

The DISTRICT ATTORNEY. It wasn't in the same store?

A. No, sir.

Q. Not in the same building?

70 A. No, sir; not in the same building with the company store. The company store is in the company store and then the drug store is in another building.

Q. The drug store and billiard hall are in the same building?

A. Yes, sir.

Q. And about 50 feet from the company's store?

A. Yes, sir.

Q. Did they keep pistols to sell in the company store?

A. I did never see.

Q. Don't you know they kept pistols like this one here in the show case, in the company store?

A. No, sir; I never seen that pistol.

Q. Where did John get the pistol?

A. I don't know; I saw him when he was in that little office in the store; nobody was in the store, only just——

Q. Then he must have gotten the pistol before he went to the store?

A. I don't understand you.

Q. He must have gotten the pistol before he went to the store?

A. I don't know nothing about it.

Q. You saw the trouble up at the post-office?

A. Yes, sir.

Q. After that trouble where did John go?

A. He looked around for something; I don't know; looked for policeman, I guess.

Q. Did you go around with him?

A. No, sir; set down right there.

Q. Maybe he went off to get a pistol then?

A. I don't know.

Q. You don't know anything about the pistol?

A. I never saw the pistol.

Q. And he didn't say anything to you about it, although he was with you?

A. Yes, sir.

71 Q. Now, after that fuss you and John came down—you say you and John came down that morning from your house to the post-office together?

A. Yes, sir.

Q. And John stopped and talked to Peter Carbo?

A. Yes, sir.

Q. John didn't go into the post-office with you?

A. No, sir.

Q. Did he stop and talk to Peter Carbo?

A. Yes, sir.

Q. Were there others standing there?

A. Yes, sir.

Q. John stopped and talked with them, and you went in the post-office?

A. Yes, sir.

Q. While you were in the post-office you heard loud talk?

A. I just went in and asked if there was any mail, and there wasn't, and I went out right away.

Q. When you came out were they quarreling?

A. Yes, sir.

Q. You heard John say, "How many carloads of coal did I steal of yours?"

A. Yes, sir; I heard that first when I went in the post-office.

Q. How many carloads of coal did I steal from you?

A. Yes, sir.

Q. You heard Peter say, "You didn't steal any, but your brother and you together stole six cars?" And then John said, "You old sucker"—or did he say, "You damned old sucker?"

A. No, sir; he just said "sucker."

Q. John wouldn't swear?

A. I don't know.

Q. John swore just as much as old Peter did, did he not? John swore, too, didn't he?

A. That is all he said, "You are a sucker." He no curse.

Q. John didn't curse at all?

A. No, sir.

Q. He wouldn't do that?

A. I don't know; he didn't say it then.

Q. But Peter said, "You are a son of a bitch?"

72 A. Yes, sir; he says, "son of a bitch."

Q. That is what made John kill him, was it not?

A. I don't know.

Q. At any rate Peter called him a son of a bitch?

A. He called him a son of a bitch; you come to fight—you want to fight this morning?

Q. John said he was sick, and didn't want to fight, and then went off and got a pistol?

A. I don't know; he never got a pistol before; I didn't see him get it.

Q. At any rate Peter told him he was a son of a bitch, and they quarreled there some *th*ime; did he strike Peter?

A. No, sir.

Q. Peter didn't strike him?

A. Yes, sir; he struck him; touched him like that somewhere in the breast; I don't know what place.

Q. Why didn't you tell these gentlemen that awhile ago, that he struck him. You said that he put out his fist; said he wanted to fight?

A. That is what he said.

Q. Did Peter strike him hard?

A. I don't know.

Q. You saw him?

A. I saw him.

Q. Then you can tell whether he struck him hard?

A. Three men standing close together——

Q. I am talking about what you saw. You have said you saw him strike?

A. Yes, sir; he struck him in the breast; I don't know whether he struck hard or not.

Q. Did he strike him a lick like this [indicating by making a swift motion with arm and hand]?

A. No, sir.

Q. About like this [indicating]?

A. Yes, sir.

Q. Then they didn't have any fight there?

73 A. John didn't want to fight.

Q. He didn't want to fight until he got a pistol to fight with?

A. I don't know; he never got a pistol at that time.

Q. He didn't draw a pistol at that time because he didn't have one to draw. This is the pistol, isn't it?

A. Yes, sir; it is new.

Q. Look at those three chambers and tell me if they have ever been fired before?

A. I do not know; I never had the pistol in my hand.

Q. Do they look like they had ever been fired?

(No response.)

(Chambers are here exhibited to the jury.)

Q. Do you know what John went to the store for?

A. No; I don't know.

Q. Didn't he tell you?

A. No, sir.

Q. Did you see him look at anything in the store?

A. Yes, sir.

Q. What was he looking at?

A. I don't know; it was a little cool that day, and——

Q. You were looking at some clothing?

A. Yes, sir.

Q. What was John looking at?

A. He go and ask something of one man.
Q. Who was that one man?
A. Charley.
Q. Is Charley here?
A. No, sir.
Q. Charley is the man he got the pistol from, is he not?
A. No, sir.
Q. Who did he get it from?
A. This man was a clerk there.
Q. Didn't he get the pistol from the clerk, Charley?
A. No.

74 Q. How do you know? Charley told him he wouldn't let him have a pistol, didn't he? He was asking Charley for a pistol, was he not?
A. No, sir; I didn't say that.
Q. He was asking for a pistol and Charley wouldn't let him have it; isn't that it?
A. I never was in a court-house in my life.
Q. You understand me, don't you?
A. Yes, sir.
Q. He was standing there talking to Charley while you were looking at the clothing?
A. Yes, sir; I was looking at the clothes.
Q. John was talking to Charley?
A. Yes, sir.
Q. What did Charley tell him?
A. I don't know; I didn't hear what he talked; what he wanted; he said something; I don't know.
Q. You know that he went in there to get a pistol, don't you?
A. No, sir.
Q. Honest?
A. Yes, sir.
Q. Are you honest about that?
A. No; I don't know nothing about it at all.
Q. Did John tell you where he got the pistol?
A. No, sir.
Q. Has he ever told you since?
A. No, sir.
Q. Why didn't you ask him; he was with you when he went to that store?
A. Yes, sir.
Q. I expect that is where the pistol came from, don't you?
A. I don't know.

Redirect examination by Mr. THOS. H. BARNES:

Up to that time John never carried any pistol as far as you know; you had been with him about a year?

75 A. Yes, sir; over a year; I don't know how long over a year.
Q. You don't know whether he got the pistol from in the store or not; you don't know anything about that?
A. No, sir.

Q. You went in there and you were seeing about some clothes, and he went to another part of the store; down to the office in the store?

A. Yes, sir; back a little.

Q. Right close to where the man that kept the books sat?

A. Yes, sir.

Q. Whether he got the pistol there or not you don't know anything about?

A. No, sir.

Q. After that, however, he said to you, "Let's go home," and you said something else, and he started on, and in two or three minutes you went out, and you saw these parties together, and this shooting occurred?

A. Yes, sir.

Q. He had been sick with chills and fever?

A. Yes, sir; he was all the time sick.

Q. You have known this boy sometime; do you know how the people there generally regard him; as to whether he was a peaceable, law-abiding boy or not; that is, not what you know yourself, but what the people there generally thought he was. Had he ever been in any trouble before while he lived there?

A. No, sir.

Q. This was the first trouble he ever had?

A. Yes, sir.

Q. Do you know anything about what Pete's reputation was there, as to whether the people regarded him generally as a lawless or overbearing and dangerous man, anything about that?

The COURT. What they said about Peter before this killing in that respect?

A. They didn't say anything good for Peter. I never was mad at Peter.

76 Q. When did they say that; since the killing or before the killing?

A. Before that.

Mr. BARNES (of counsel for defendant). That was the name he had?

A. Yes, sir; before that.

Witness excused.

77 MIKE GERKO, having been duly sworn upon behalf of the defense, was examined by Mr. N. L. Marmon, and testified as follows, to wit:

Question. You are a brother of John, the defendant, are you?

Answer. Yes, sir.

Q. Go ahead and talk the best English you can and tell about it.

A. I can't understand you.

The COURT. Oh, yes, you can understand.

Mr. BARNES (of counsel for defense). I am satisfied he understands it less than any of the others, but we can try him.

Mr. MARMON (of counsel for defense). State all you know about this difficulty up there. Were you present when your brother killed Pete Carbo? (To the court.) I do not think he understands me. He never has talked to me in English. He probably can understand me, but he can't speak it.

Q. What did they tell you?

A. Some of the people did tell me that they had a right to kill him, because they were scared. They were not all on his side.

Q. Had a right to kill him on general principles?

A. Yes, sir.

Mr. MARMON (of counsel for defense). If the court please——

The COURT. What question do you want to put to him?

Mr. MARMON (of counsel for defense). What I want to show is this: I don't think the witness understands. What he wants to express is this——

The COURT. You know what he wants to express?

Mr. MARMON (of counsel for defendant). Yes, sir.

The COURT. You have talked to him outside?

Mr. MARMON (of counsel for defense). Yes, sir.

The COURT. That gave you a cue to what you want him to testify. If he does not come up to the standard that the law prescribes we can not help that. He must be able to answer the question as to the particular thing. You may ask him any question which is proper under the law, and let us see if he can understand it and answer it. We will try him again.

Mr. MARMON (of counsel for defense). I want to say this: I only knew about it this afternoon, when he came and told me about it.

The COURT. That was all right for you to ask him, but he must testify here upon his own knowledge and not upon suggestions. Put the question now in a legal way and see if he knows about it.

82 Mr. MARMON (of counsel for defense). You have already stated that you knew his character——

The COURT. No, he has not; not in a satisfactory way. You ask him if he knows how the people generally regard him in the community there as to being a peaceable, law-abiding man.

Mr. MARMON (of counsel for defense). I think the court asked that question, and he said he did.

The COURT. I will ask him again. Did you know, before the killing took place, how the people in that community generally regarded this man—as a peaceable, law-abiding man, or whether he was a lawless and desperate man—how they generally regarded him?

A. I heard all the time——

Q. You don't tell me what you heard; you answer the question. Do you know how they generally regarded him?

A. Yes, sir; I heard talk——

Q. You say yes?

A. Yes, sir.

Q. Was that character good or bad?

A. I think it was bad.

Cross-examination:

The DISTRICT ATTORNEY. How was it bad; how bad was it?

A. I heard they gave him a bad name.

Q. That it took three or four men to whip him?

A. Yes, sir.

Q. You say his character was bad because he was a strong man—could whip three or four men?

A. Yes, sir.
Q. And that the people thought they had a right to kill him because he could whip three or four men?
83 A. He wouldn't respect anybody.
Q. Did you ever hear of him killing anybody?
A. No, sir.
Q. Did you ever hear of him shooting anybody?
A. No, sir.
Q. Did you ever hear of him hitting anybody with brass knucks?
A. I heard of him hitting with his fist.
Q. Did you ever hear of his hitting anybody with a knife?
A. No, sir.
Q. Did you ever hear of his going armed?
A. No, sir.
Q. Did you ever hear of his hurting anybody?
A. I heard him hurt with fist.
Q. All you know about it, he was a man pretty good to fist fight.
A. Yes, sir.
Q. That is all you know about it?
A. Yes, sir.
Q. You heard he was a man pretty hard to whip?
A. Yes, sir.
Witness excused.

84 MIKE GERKO, upon being recalled, was examined through an interpreter by Mr. N. L. Marmon, and testified as follows, to wit:

Question. Ask him what is his name?
Answer. Mike Gerko.
Q. He is a brother of the defendant, is he?
A. Yes, sir.
Q. Ask if he was present at the time of the shooting?
A. No, sir; he was at the mine.
Q. Where was he?
A. He was working at the mine at the time of the fight.
Q. Ask him if he knows of any difficulty between the deceased and his brother?
A. No, sir; he don't know.
Q. Did he have any difficulty with Pete——
The DISTRICT ATTORNEY. One moment; I do not think that is competent.
Mr. MARMON (of counsel for defense). Ask him if he knows of any threats made by Pete to him, communicated to his brother, against the defendant?
A. He says that Pete always claimed this fellow stole carload of coal from him, and this fellow was working for the company, and he was working for himself, and Pete says, "If you fellows steal from me coal I will shoot both of you." That is what Pete said to him and his brother together.
Q. Ask him if he did steal anything from Pete?

A. He says he always claimed he lost the coal, but he said he never stole it, or his brother never stole one lump out of it. He says they are always changing from one end to the other, and he says he never
85 stole a lump of coal from him.

Q. Ask him how long it was that this was before this killing occurred?

A. It was about two weeks. His brother was sick and 'e could not get up to work.

Q. Ask him how often Pete abused and threatened him and his brother?

A. He says that every time he met him he called him a son of a bitch, or his brother, and he said his neighbors that worked in the mines made fun of him because they let Pete call them son of a bitch.

Q. Nearly every day when he met them Pete called him or his brother a son of a bitch?

A. Yes, sir.

Q. While John was sick?

A. Yes, sir.

Q. Ask him if he ever told John of that?

A. He never said it to him, but he said it to the people in the mines, that he was going to shoot him like a dog.

Q. Ask him if he ever told John about that?

A. He says every day when he came home he always told John what the people was saying, that he was going to shoot John like a dog.

Q. He told John about it?

A. Yes, sir.

Q How old is the witness?

A. 17 and about 2 months.

Q. How old is John?

A. About 18 and 6 months.

Q. Ask him how long he has been in this country?

A. Two years.

Q. How long has John been here?

A. Four years.

Cross-examination:

The DISTRICT ATTORNEY. He says that Pete didn't tell that to him, but the people in the mines?

A. Yes, sir.

86 Q. What people in the mines was it that told him that Pete said he was going to kill him and his brother?

A. He says Pete always, every time he met him right in the mines, he called him a son of a bitch, and told him he was going to kill him and John both.

Q. What did he mean when he said that Pete told it to the fellows in the mines, and not to him; now he says he told it to him?

A. He says several times he heard it himself, and several times the neighbors told it.

Q. Who were the neighbors that heard it?

A. He says several of them over there, but several of them have quit there and gone away; George Washing is one.

Q. Where is George?

A. He says he is over there yet.

Q. Who else, now?

A. He says he can't recollect their names now.

Q. Tell him to tell another one that is here.

A. He says there was several of them, but he can't recall their names.

Q. Ask him if he does not think it is quite strange that he does not remember the name of any of the others.

A. He says he knows lots of names, but he can't call the names that were there; he says they are kind of funny names; he says he knows the first name, like John, or Mike, but he can't call the second name.

Q. They are there yet, are they not?

A. Yes, sir.

Q. He was a pusher in the mines, wasn't he?

A. Yes, sir.

Q. He carried the tags with him, didn't he; what was his brother's number?

A. He says he don't know.

Q. Don't he know what his check was?

A. No, sir.

Q. Wasn't it 16; ask him if Pete Carbo didn't charge him with having some of his brother's checks, and when he would push a car out be-
87 longing to Carbo he would take Pete's check off and put his brother's on?

A. He says Peter claimed it, but he never did.

Q. Pete claimed that he was stealing his coal in that way?

A. Yes, sir.

Q. Ask him if he didn't claim that he stole six carloads of his coal in that way?

A. He says that he never said how many carloads, but he claimed that he stole coal from him.

Q. Then it was when Pete charged him with stealing coal that he said to him, "If you steal any more of my coal I will kill you;" is that it; that "I will kill you both like dogs if you steal any more of my coal;" did he charge his brother with stealing coal too?

A. Yes, sir; he claimed him and John did.

Q. That is, that John gave him his *checke*, and he changed them, and John got paid for the coal that Pete dug?

A. No, sir; he never claimed that he had John's check, but he always claimed that he put the checks on.

Q. Whose checks?

A. John' checks.

Q. That is what I say; in that way John would get pay for digging the coal that Pete claimed to have dug; he was dig'ing, John was, and Pete and this man was pushing?

A. Yes, sir.

Q. When a man would dig the coal he would fill the car with it, wouldn't he?

A. Yes, sir.

Q. Then if it was Pete he would put his own tag on it, would he not?

A. Yes, sir; on the inside, underneath the coal.

Q. Then Pete would get paid for the coal, would he not?

A. Yes, sir.

Q. But if he would take Pete's tag out and put John's in, then John would get paid for the coal, wouldn't he?

A. Yes, sir.

Q. And Pete charged him with doing that thing, stealing his work from him?

88 A. Pete always claimed to him, but he told him all the time——

Q. Never mind that; I asked a simple question, if that was not what Pete charged him with, there?

A. Yes, sir.

Q. Then Pete charged him and John with stealing his work; stealing his labor?

Mr. MARMON (of counsel for defense). I think we have a right to have him explain that.

The COURT. You can call that out and have him explain it if you want to.

The DISTRICT ATTORNEY. In that way Pete charged him with not stealing his coal, but with stealing his labor, his work?

A. He says he never said it to John, but he always told him.

Redirect examination:

Mr. MARMON. The coal is put in little cars, two ton in a car, is it not?

A. About 25 bushels in a car.

Mr. BARNES (of counsel for defense). Ask him if through the mistake of the rope-walkers they do not often get cars in the wrong place, and get two tags on instead of one?

A. He says several times they make mistakes, the drivers do; they will live the check on and get two checks in the car.

Q. Who puts the check in the car?

A. He says the digger puts the check in the car. He says several times the driver forgets it and the check comes back in the empty car.

Q. Ask him if two checks wouldn't get in the same car that way?

A. Yes, sir; he says that.

89 Q. Don't he know that the digger puts the check in the car, and puts it in the bottom of the car?

A. That is what he said awhile ago.

The DISTRICT ATTORNEY. He puts it on a nail right down at the bottom, back part of it, rither here [indicating].

The INTERPRETER. He says underneath the coal on the inside of the car.

Mr. MARMON (of counsel for defense). At the bottom of the car?

A. Yes, sir.

Q. What kind of a check is that?

A. He says a leather check, and every check has a number on it.

Recross-examination:

The DISTRICT ATTORNEY. How big is that check? As big as a dollar?

A. Yes, sir; about the same as a dollar.

Q. Has a hole in it, hasn't it?

A. Yes, sir; got a little hole in it.

Q. What is that little hole in it for?

A. He says the inside of the car has a nail and on that you hang the check.

Q. On the back part of it, low down, there is a nail that comes out and turns up?

A. Yes, sir; inside at the back part.

Witness excused.

90 GEORGE W. ANDERSON, having been duly sworn upon behalf of the defense, was examined by Mr. N. L. Marmon, and testified as follows, to wit:

Question. Where do you live?

Answer. I live at Alderson, Indian Territory. My home proper is in Krebbs, Indian Territory.

Q. I will ask you to state if you know anything about this transaction about the killing of Pete Carbo?

A. Yes, sir; I seen Peter Carbo killed.

Q. I will ask you to state the first you saw of the fight; the beginning of the difficulty; the first of it?

A. What I term the beginning of the trouble was the trouble in front of the post-office—that is, the store that I wroked in.

Q. You were in there?

A. Yes, sir.

Q. What time in the morning was that?

A. That was somewhere between 8 and 9 o'clock; I could not tell just precisely what time it was when the trouble began.

Q. State what occurred there?

A. Well, I was in the store there, and, as usual, around the post-office there was a crowd gathered there for the mail, at distributing times, and other times men congregate around in front of the store and in the store, and this morning, which was the morning of the first of November, 1892, there was quite a crowd gathered right in front of the window and door of the store, or post-office, and it was not long until my attention was called to the loud talking out there by the postmistress.

Q. Who was doing the loud talking?

91 A. The man who was doing the loud talking was Peter Carbo, the man who was killed. He appeared at that time to be angry, and was talking pretty loud when I first saw him. I heard him talking there before I got in position where I could see him. I saw him then quarreling with John Gerko.

Q. The defendant here?

A. Yes, sir.

Q. Now, go ahead and tell us what you heard and all about it?

A. I seen them there quarreling; and I seen Peter Carbo shake his fist at John, and putting his fist up under his nose, and using considerable bad language.

Q. Just tell what he was saying?

A. The man's talk was in the Slavish language, and that I didn't understand, but I could hear him call him in our language a damned son of a bitch. I could hear that. I heard him say that frequently, several different times, and John Gerko there, when he would be shaking his fist at him he would be stepping back, backing away. I seen him back as far as from here to you, and pass around the crowd. And it would only be a few moments until Peter would be there.

Q. Peter would follow him up?

A. Yes, sir. And in the intervel he would sometimes have one hand in his bosom and the other hand behind here. Of course, I didn't know whether he was armed or not. I stood in the store where I belonged, and after a little while the disturbance out there ceased, and they separated, and then in a few minutes after that, just a short space of time, I don't know just how long, Mr. Gerko there came back to the store, and the postmistress spoke to him, called him in and had a talk with him, and told him she didn't wish any more trouble. And I was speaking to
92 Mr. Gerko there, as I was acquainted with him, and told him that the postmistress didn't want any more trouble in front of here, in front of her window, and no more such language as that was, and I told him to keep away from Peter Carbo, and have no more trouble with him. I also asked him if he was armed, and he said he was not. And presently—just about that time there was a customer come in, and I had to leave him and go back to my work, and after I went back to my work, waiting on the customers, I can't tell how long that was, but I got through with the customers, and I happened to walk to the store door, and I leaned up against the side of the door, and was standing there, and presently I saw Mr. Gerko there coming right to me from behind the billiard hall, that was in front and to the right of me, right across the street or passageway; he was coming around that, and he was coming directly towards me, as though he was coming to the post-office, or me and the door, just as though he was coming right over to our store, and as he got up almost opposite the front of the billiard hall I was in the act of calling to him, or saying something to him—I am pretty noisy sometimes to the boys around there and call to them or say something—and just as I was going to speak, Pete Carbo and him got into conversation, and I said nothing.

Q. Where did Peter come from at that time?

A. When I first saw him he was right in front of the billiard hall, standing out in front, and Gerko was coming right up this way, and when the conversation occurred Gerko stepped out here at the right-hand corner of the billiard hall and Peter Carbo advanced right up towards him, that way, until they were a few paces apart, and they were saying some-
93 thing I could not understand; I don't think it was in our language; if it was I didn't understand it. Still, I didn't think of any trouble; they were not talking loud at that time, as I understood it.

Q. You could not understand what they were saying?

A. No, sir; the first thing then I seen was Gerko drew a small bright pistol from his pocket, and he shot at Carbo, and he apparently shot almost in that direction, over his head, and he then almost instantly shot the second time, and Carbo dodged to the right and down'ard, and he shot again, and the third time he shot he dropped his gun further down and fired and Carbo fell.

Q. I will ask you what kind of an attitude Carbo was in at that time; where were his hands at that time?

A. I can't remember just which hand it was, one hand apparently was thrust in his bosom and the other hand was behind him, but which hand it was I can not call to mind. It wasn't but just a short time from the time he began to advance until the shooting was done.

Q. I will ask you if you noticed when he put his hand behind him?

A. I think when he started out in front of the billiard hall, about 10 or 12 feet from the front of the billiard hall is where I saw him start from, advance out to where Gerko stood.

Q. I will ask you to state if you know whether he began to talk to the defendant here when you saw him start out of the billiard hall, when he started towards him?

A. Yes, sir; but I could not understand what he said. I think that was in the Slavish language—in some language besides mine. But as he went out there he was talking. I could hear their voices, but I could not understand anything that was said.

Q. I believe you say they came around from the front, and
94 Peter came out from the back?

A. No, sir; Peter was standing in front, and Gerko, the first I seen of him, he was opposite the rear of the store, coming up the street or passage way, or whatever you call it, the pass way, and when he got up opposite there, where he could see by the corner of the billiard hall here, like this was the billiard hall, and Gerko was coming up this way, bearing right across, just as though our store was right over here, and he was bearing over from this, as though he was coming over right direct to where I was standing in the door, and Peter Carbo, the first I seen of him, was right in front of that store, and when they began to talk Peter Carbo advanced right out that way, and when he got up in three or four paces of him Gerko stopped.

Q. They met right there?

A. Yes, sir; when they got together Peter was talking, and I don't know whether this man was saying anything or not.

Q. They were saying something in their own language which you did not understand?

A. Yes, sir; that boy was standing still when Peter was advancing, and he was standing still when the first shot was fired.

Q. The first shot was fired over his head?

A. Yes, sir.

Q. I will ask you to tell me what was the manner of this young man after he had done the shooting, what he did?

A. When Peter fell, for a few minutes he just stood right there where he was, with his hands hanging down by his side, and from the store door where I was it looked to me like he turned deathly pale, seemed to be just fixed, standing there perfectly fixed looking at Peter, and he stood that way until the men that was in front of the billiard hall began to
95 start out to where Peter was laying. Peter was laying between the bunch of men at the front of the billiard hall and Gerko, and after the men began to start out that way he turned around and started right towards the mouth of the slope, or tipple top, as we call it. He only went just a few steps until he was caught. He hadn't got further than five steps from there when he was caught.

Q. About 5 steps, you think?

A. Yes, sir; 5, 6, or 8 steps, or something; it was all done quick.

Q. How long had you known the defendant?

A. I don't know when I did first get acquainted with him. I am in the store there, and I frequently know men's faces, and know their faces

probably a good while before I get acquainted with them. I don't know just how long I was acquainted with him. I was acquainted with him just a short time.

Q. You are there in the store; you usually know the men about there; you know their character, don't you, usually?

The DISTRICT ATTORNEY. That is no way of putting that question.

Mr. MARMON (of counsel for defense). I will ask you if you know the character of this boy as a peaceable, law-abiding man or boy; how the people generally regard him there?

A. He is generally regarded as a very peaceably boy, or, at least, he has never been in any trouble there.

Q. You have to answer whether you know it or not. Do you know it; if you do, say yes, and if you don't, say no?

A. It is a hard question to answer. As far as I personally know——

The DISTRICT ATTORNEY. Hold on. If Mr. Marmon would put his question right there would be no trouble.

Mr. MARMON (of counsel for defense). Do you know how the
96 people there regard him, whether he is regarded by the community——

The COURT. That is, did you know it before this killing—that is, how he is generally regarded by the people as to his being a peaceable, law-abiding man?

A. Yes, sir; I have heard that spoken of there. The boy was sick there quite awhile——

Q. You say you know how he was regarded in that respect?

A. Yes, sir.

Q. By the people generally?

A. Yes, sir; by the general class of people; they regard him as a nice boy; spoken of as the same.

Mr. MARMON (of counsel for defense). Was that reputation good or bad?

A. It was good.

Q. I will ask you if you knew the reputation of Pete Carbo before his death for being a dangerous, desperate man?

A. Peter Carbo was considered——

Q. You have to answer yes or no, to that question.

The DISTRICT ATTORNEY. I wish your honor would put that question.

The COURT. Do you know how the people generally regarded him as being a lawless and desperate man?

A. Yes, sir.

Q. How did they regard him? Was that character good or bad in that respect?

A. His character was bad in our camp.

Q. That was before the killing?

A. Yes, sir.

Cross-examination:

The DISTRICT ATTORNEY. What do you mean by character?

A. The general demeanor.

Q. That is what you mean?

A. Yes, sir.

97 Q. His general demeanor, as you understand it?
A. Yes, sir.
Q. As you have seen it and observed it?
A. Yes, sir.
Q. That is what you mean by character?
A. Yes, sir.
Q. What did you ever see about Peter that made you think his character was bad?
A. I had been dealing with Peter myself, and he was very overbearing towards me, and I have seen him also overbearing in his talk towards others.
Q. Did you ever see him armed?
A. No, sir.
Q. Did you ever see him shoot at anybody?
A. No, sir.
Q. Did you ever hear of his shooting at anybody?
A. No, sir.
Q. Did you ever see him have brass knucks?
A. No, sir.
Q. Did you ever hear of him hitting at anybody with brass knucks?
A. No, sir.
Q. Did you ever hear of him having a fight?
A. No, sir.
Q. You never heard of his having a fight in his life?
A. No, sir.
Q. You never knew of his being armed, and yet you state on the stand, swear by the living God, that he is a man of desperate and lawless character. Do you know what you are swearing to?
A. I know I am trying to swear to the truth, just as I see it, to the best of my knowledge.
Q. Do you swear that a man who never had a fight in his community; that you never heard of him having fights; that you never heard that he carried an arm in his life—are you willing to swear that man's character is that of a lawless and desperate man? Are you willing to do that?
A. I am willing to swear just as I have.
Q. That is what you have sworn to, and yet you make the man
98 a peaceable man, and a man who never had a fight in all his life, as far as you ever saw or know.
A. No, sir; as far as I ever seen.
Q. What do you mean, then?
A. Just his overbearing demeanor towards me and others that I have seen.
Q. Always took it out in talk?
A. Other men were like myself; I didn't like to get into any trouble with him.
Q. You never saw him have a fight or heard of his having a fight?
A. No, sir.
Q. Who did you ever hear say that he was a man of a desperate and lawless character?
A. I said so myself.
Q. That does not make it so, by a long ways.

A. I heard other one' speak about it.
Q. Who?
A. My brother-in-law, J. W. Dobbins, was one.
Q. Did he have a fight with him?
A. No, sir; he came very near it.
Q. Anyone who comes anywhere near having a fight with you or your brother-in-law becomes a desperate and lawless man?
A. No, sir; he is not the only man.
Q. You don't know what you are swearing to, do you?
A. I think I do.
Q. You are willing to swear that a man who never goes armed——
I could not say that he never went armed——
Q. As far as you know?
A. Yes, sir; as far as I know.
Q. As far as your oath is concerned?
A. I don't know that he ever was; I never paid any attention to it.
Q. You never heard of his having a difficulty in his life, and yet you state here on your oath and before your God and swear that his character is that of a desperate and lawless man. What law did he ever violate?
A. I don't know what laws he has violated.
99 Q. Why do you call him a lawless man? That means a violator of laws. Why do you swear that that is his character? You are swearing to it because he is dead, are you not?
A. No, sir.
Q. How long have you known this boy here?
A. I was acquainted with that boy——
Q. Three months?
A. No, sir; personally acquainted with him just about a month before the killing—that is, personally acquainted with him. I had began to talk to him when he would come into the store, and he would talk to me different times.
Q. You had just began to talk to him?
A. That is, in a very friendly manner with him when he would come into the store, and I would have le*asi*re, just the same as I do other young men that came into the store as customers.
Q. You were acquainted with him about a month and he had been sick?
A. Yes, sir; he was sick—able to be around sometimes. Sometimes I would inquire about him.
Q. I would like to inquire of you what his sickness would have to do with his character?
A. Nothing, only that the men would speak about him in the store.
Q. Speak about him being sick?
A. Yes, sir; and that he was a good boy, and they were sorry——
Q. Do you know anything about his history?
A. No, sir; only just——
Q. Do you know anything about his life?
A. No, sir; only while he was there.
Q. Only a month that you know of him?
A. Yes, sir.
Q. You know nothing about his history?
A. No, sir.

Q. You don't know how many fights he has been into?
A. No, sir.
Q. Or how many men he has killed?
A. No, sir.
100 Q. You never heard anybody talk about his conduct anywhere but in Alderson?
A. No, sir.
Q. And that is only a month?
A. Yes, sir; something near about.
Q. We will pass that on the question of character. You saw the first difficulty there. What did the defendant call Peter Carbo, or say to him while he was standing there in front of your store?
A. I didn't hear him call him anything; they were talking in a different language from me.
Q. They were cursing each other, were they not?
A. I could not say whether Gerko was cursing or not; if he was he was cursing in a different language from ours.
Q. What language did Peter curse in?
A. Peter every once in a while would speak in English.
Q. He would go outside of his native language to get some cuss words?
A. Sometimes he would, and then he would speak in his own language; I don't know nothing of what that was.
Q. You don't know what this defendant said to Peter?
A. No, sir.
Q. You can't tell?
A. No, sir.
Q. You can not tell whether he cursed him, or what aggravating language he used?
A. No, sir.
Q. You don't know what they were quarreling about?
A. No, sir.
Q. Did he strike Peter?
A. No, sir.
Q. Did Peter strike him?
A. No, sir; I don't think he did. All I did was to see Peter just shake his fist at him. I don't think I saw Peter lay his hands on him at all.
Q. When was it during that controversy that he had his hand on his bosom this way, and his hand behind his back this way?
101 A. That would be at intervals when they were apart.
Q. He would shake his fist at him, and when they would get apart and not be quarreling he would stand that way?
A. Yes, sir.
Q. That is the way he stood when he wasn't quarreling?
A. Yes, sir; something like that.
Q. His left hand here on his bosom?
A. I can't tell which hand he had in there.
Q. He was accustomed to stand that way a great deal, was he not?
A. I saw Peter with his hand on his bosom a great many times.
Q. That is an answer to it. He was accustomed to walk that way; he would stand with his hand behind his back, too, would he not?

A. I don't know about that, but I have often seen Peter with one hand in his bosom. I never noticed his having his other hand behind him.

Q. Did Peter have a coat on that day?

A. Yes, sir; I believe he did.

Q. Don't you know that he was shot in his shirt sleeves; that he never had a vest on, and not have a coat on? Don't you know that upon that day he carried his hand in his bosom, between his outer and undershirt?

A. I am not positive about that, but I know that Peter often put his hands up here.

Q. He could do that——

A. Yes, sir; certainly, with the undershirt on, but I will not be positive about the coat. I know his hand would go up there.

Q. I am not trying to show by you that he didn't have his hand in that position, because they all agree that he had, but here is the point: if he was in his shirt sleeves his hip pocket could be seen, and if a pistol was carried in there it could be discovered.

A. I never saw any pistol.

Q. It would be very hard to carry a pistol in the hip pocket
102 without it being seen if a man's coat was off?

A. I expect it would. The pistol could be seen.

Q. A pistol could not be carried in there without being seen, could it?

A. Hardly.

Q. Did you see any on him?

A. No, sir.

Q. If he was in his shirt sleeves, and his hand behind his back, this way, and this hand here, that would indicate nothing, would it?

A. No, sir; I don't know that it would. It seems that a gun of that kind could be seen in a man's pocket.

Q. Now, how was the defendant dressed; did he have a coat on?

A. Yes, sir.

Q. Did he have a coat on all the time when they were quarreling, and when he did the shooting, too?

A. Yes, sir; I think so.

Q. So if he had a pistol in his hip pocket it would be hid, wouldn't it?

A. Yes, sir; I think it was.

Q. Was it warm or cold that day?

A. It was the first morning of November; it was just a little cool; it wasn't what you would term cold, or very warm.

Q. That day was a kind of a holiday?

A. Yes, sir.

Q. It was a holy day with the Catholic church?

A. Yes, sir; I talked about it with Hungarians, Slavs, and Italians, and they said it was a holiday of their own country.

Q. Not a holiday or holy day of the church?

A. Some kind of a church holiday; I didn't understand it. They just told me they were out on a holiday.

Q. Now, then, when they quit quarreling there where did Peter Carbo go?

103 A. Well, sir, that is more than I can tell you, because I went to work.

Q. He went to the billiard hall, did he not?

A. I think he did. I am pretty positive that he did, but I don't know where he did go.

Q. Where did the defendant go?

A. I don't know where he did go, only just from what he told me when he came back.

Q. I will ask you if you knew that he went to get a pistol?

A. No, sir.

Q. Why did you then ask him when he came back if he got a pistol?

A. That is when he went the marshal's.

Q. That is what I mean—between the time of the first difficulty and the second difficulty, he left and went off?

A. Yes, sir.

Q. Did you know that he was going for a pistol?

A. I didn't know where he went.

Q. Did you suspect he went for a pistol?

A. There was a little colored boy or some one says that John has gone after a gun, and when he came back I asked him.

Q. Some little colored boy said, "John has gone after a gun?"

A. Yes, sir.

Q. And so when he came back you asked him if he had a gun?

A. Yes, sir.

Q. He told you no?

A. Yes, sir.

Q. But that he had been after the marshal; did he tell you that?

A. Yes, sir.

Q. He told you that he went up after the marshal and he was in Fort Smith?

A. Yes, sir.

Q. Did you know that he had a gun at that time?

A. No, sir.

104 Q. Do you know where he got the pistol?

A. No, sir.

Q. Do you not know?

A. Not personally; I don't know.

Q. Do you know it in any other way?

A. I know it by hearsay.

Q. Did you ever hear the defendant say where he got it?

A. No, sir.

Q. I will ask you, if you don't know, and if you didn't hear the defendant say that he got it from a man named Lewis, a clerk in one of these stores, from Philadelphia, and shortly after this [illegible] was arrested went back to Philadelphia?

A. No, sir; he never told me that he got it from that man.

Q. Where is Lewis?

A. He is in Alderson.

Q. There was one clerk that run off?

A. That is Lewis.

Q. He has got back, has he?

A. Yes, sir; he is what is termed script boss.

Q. He is the one who run off immediately afterwards?

A. Yes, sir; that is what they say. He went away and got married. He got married and came back. It was said at that time that he run off; I don't know anything about it.

Q. Where was John Lewis that day?

A. I don't know; he works in the Grady Trading Company.

Q. What is his name?

A. He goes by the name of Lewis.

Q. Charley or John?

A. I think it is John Lewis—I know his name is Lewis; I don't know what his first name is.

Mr. BARNES (of counsel for defendant). You say that he was working in the company store at that time?

A. That was my understanding. I didn't go around the company store, and I don't know anything about it, only it was understood that he was working there. I don't know whether he run off or how, but he disappeared.

105 He went off and got married and came back right away?

A. Probably he did.

The DISTRICT ATTORNEY. When he left your store the second time and came back, you asked him if he had a gun; where did he go then?

A. He went out of my store, and I seen no more of him until he came around——

Q. How long was that before the shooting?

A. It was only just a little while. I waited on one or two customers. When I walked to the door it could not have been long, just a few minutes; I don't think it could have been very long.

Q. He went off and came back, and when he came back Mr. Carbo wasn't there, was he?

A. No, sir; he wasn't at the post-office.

Q. Then you don't know where the defendant went? Did you see him go over to the company's store?

A. No, sir; I didn't see which way he went after he went out of our door.

Q. Did you know where he was going?

A. No, sir.

Q. He left your place, and the next time you saw him you were standing leaning against the door facing of your door looking right over towards the billiard hall?

A. Yes, sir.

Q. Did the billiard-hall door face right towards your store door?

A. Yes, sir; a little to the right.

Q. When you looked over there, had Peter Carbo came out of the store?

A. I could not say.

Q. Was he there outside, or inside?

A. When I first saw Peter Carbo he was on the outside.

Q. You didn't see him on the inside?

A. No, sir.

Q. If he had been in the store there and came out, you did not see him until he came out, did you?

106 A. No, sir; if Peter Carbo was in the billiard hall I didn't see him in there, or I didn't see him come out; the first I saw of him was in front.

Q. When you saw Peter standing out there in front of the store, if he had gone in he had come out, and was out of your sight when he was in there?

A. When I first saw him he was out there.

Q. When the defendant came back he came back from around that side didn't he?

A. Just to make an illustration, this is the billiard hall here, and that the Grady Trading Co. over here, and our store here this way, and there is a kind of a street in through here, and the first I seen of the defendant was here.

Q. He came out from towards the railroad?

A. No, sir; he came right towards our store.

Q. I say, from towards the railroad?

A. Yes, sir.

Q. Peter Carbo was standing in front of the store?

A. Yes, sir; right in front of the billiard hall.

Q. What was he doing?

A. Standing there talking.

Q. Who was he talking to?

A. He was talking to some more men there.

Q. Was he talking to the men or was he talking to this defendant?

A. He was just standing there in the crowd.

Q. You don't know who he was talking to?

A. No, sir.

Q. You saw him standing there?

A. Yes, sir.

Q. The other men were standing around?

A. Yes, sir; just standing around like they usually do in a crowd.

Q. Who were these other men?

A. I don't know just who they were.

107 Q. Mr. Leachman was one?

A. I didn't see him.

Q. Didn't you see him when he caught the man?

A. Yes, sir.

Q. Then he must have been there?

A. The first I saw of him was running out of the billiard hall with a cue in his hand.

Q. Did you see Jim Wingo there, and Felix Augistine?

A. I saw Felix Augustine; that is, I saw him after the shooting.

Q. Did you see William Wingo?

A. I don't remember of seeing him.

Q. Did you see Thomas Whitney?

A. No, sir.

Q. Did you see John Rutledge?

A. No, sir; that is, I don't remember it now.

Q. Were these men not all there?

A. They might have been there.

Q. At any rate there was some men there?

A. Yes, sir.
Q. This defendant came from around the house?
A. Yes sir.
Q. As he came up here Peter made a step or two towards him——
A. They were talking there; I could not understand what they said when the' came up.
Q. When they came up they were talking?
A. They began to talk.
Q. And the boy, you say, made a few steps?
A. Yes, sir; Peter Carbo walked out.
Q. How far did he walk?
A. Just stepped right out to him.
Q. Three or four steps?
A. Yes, sir; not very far.
Q. Three or four steps?
A. Yes, sir; I suppose something like three or four or five steps. He was going right up this way and Peter Carbo came right out that way.
Q. What was he doing?
A. They were talking at that time.
Q. Did he make any effort to strike him?
A. Not that I seen.
Q. Did he make any effort to get to him?
108 A. Not that I seen, only just walk out there.
Q. Was he running or walking?
A. Walking.
Q. Fast or slow?
A. Just ordinarily.
Q. Then you saw the defendant pull out his pistol?
A. Yes, sir.
Q. Did he say anything?
A. He may have said something, but I could not understand what they said.
Q. The men who were there, I suppose, had a better opportunity to understand it than you had?
A. Yes, sir.
Q. How far were you from them?
A. I was near about 30 paces.
Q. Thirty steps away?
A. Yes, sir.
Q. 90 or 100 feet off?
A. Yes, sir.
Q. You saw the defendant pull a pistol out of his hip pocket?
A. Yes, sir.
Q. Raised it up and fired it that way?
A. Yes, sir.
Q. That was the first shot?
A. Yes, sir.
Q. Then Peter dodged down?
A. Yes, sir.
Q. And he brought his pistol down?

A. Yes, sir.
Q. Then he fired the second shot?
A. Yes, sir.
Q. Then what did Peter do?
A. He went further down.
Q. Then he put it down and shot him?
A. Yes, sir.
Q. That is about the way you saw it?
A. Yes, sir; that is very near the way I saw it.
Q. Peter was dodging and he was bringing the pistol down on him?
A. Yes, sir; the first shot Peter dodged to the right, and the second shot a little further, and the third shot——
Q. He dropped?
A. Yes, sir; he dropped right on to the ground.

Q. Let's see if I have your statement down right: I didn't see
109 Peter until he came out of the billiard hall, if he had been in it. The defendant came from around the billiard hall from towards the railroad?

A. Yes, sir; from the south, towards the north.
Q. And they were talking, and I could not tell what they said. I was bout 30 yards from them. They met; Carbo walked in four or five steps, nd the defendant pulled his pistol out and fired the first shot over his head, nd Peter dodged his head to the right and down; then defendant dropped is pistol lower and fired again, but missed him; and then Carbo dropped his head still lower, and the defendant dropped his pistol lower and shot him, and Peter dropped?
A. Yes, sir; that is about it; about like I seen it.
Q. When Peter dropped the defendant turned pale, you say; turned pale after the shooting?
A. Turned white.
Q. Here is the front of your store over here where this book is where you were standing, 30 yards away, and Peter was on that side, and the defendant on that side; in such a position that you could look right square sideways, could you not?
A. Yes, sir.
Q. You could see the defendant; his right side was towards you, and Peter's left side?
A. That man's right side was towards me.
Q. And Peter's left side?
A. Yes, sir.
Q. So you could look right at them?
A. Yes, sir.
Mr. BARNES (of counsel for defendant). Which way was your face?
A. To the south.
The DISTRICT ATTORNEY. Tell me how the deceased got his shot here on the left side of the head?
A. He must have had his left side to the man who shot him.
Q. He wasn't dodging, I suppose?
A. Dodging downwards.
Q. How close down did he get to the ground before he was shot?

110 A. I can't hardly say.

(Here the district attorney takes a pistol and represents defendant and has witness represent the deceased, and dodge as he saw the deceased dodge when the defendant shot the three shots at him.)

Q. Then before these people rushed out and caught him he started to go off towards the tipple top?

A. Yes, sir.

Q. That is the pit top where the coal comes out of the slope; he was going toward that place?

A. Yes, sir.

Q. He was going towards the opening in the coal mine?

A. Yes, sir; down that way.

Q. How large a place is it down there where you dig that coal; how many alleys and avenues and underground excavations have you got there?

A. There is first east and second east, and first west and second west——

Q. It is a pretty good hiding place, is it not?

A. I suppose it is, if a man gets in there once. It goes down to the sixth east and sixth west.

Q. If a man gets in there he has got a good long range to run aroun in and hide?

A. Yes, sir.

Q. This occurred on the first Monday in November, didn't it?

A. On the first day of November.

Q. Are you a white man or an Indian?

A. I am a white man; that is, I suppose I am; a citizen of the United States.

Q. You are not a foreigner; you do not belong to any of these nations?

A. No, sir. My forefathers as far back as I know anything about are Americans.

Redirect examination:

Mr. MARMON. You speak about his going in the direction of this
111 shaft. A party could not go down into the mine v'ry conveniently from the back of that billiard hall down into the mine, could they?

A. You can go right across 75 or 80 yards, between 80 and 100 yards, to the mouth of the slope. It is a slope, and not a shaft. It goes in gradually, follows the coal down; the coal crops out and you follow it right down; they follow the dip.

Q. Which way is that running?

A. It runs to the south.

Q. It dips to the south?

A. Yes, sir.

Q. All of these veins dip in the same direction, don't they?

Yes, sir; all I know something about.

The COURT. A man can walk right into the front of this slope and go right down?

A. Yes, sir. They take mules down in the mines; they take them in in the morning and bring them out in the evening.

Mr. MARMON (of counsel for defense). They usually keep that fastened on days they are not working, do they not?

A. No, sir; there is no way to fasten them; there is always men working there.

Q. I believe you stated that he had only started and walked off and went a few steps?

A. That is all; just a few steps.

Q. He didn't start off in a run, or anything like that?

A. No, sir; he was only a little bit away when Mr. Leachman ran up to him and caught him, and Felix Augustine went with him.

Mr. BARNES (of counsel for defense). My understand' is, this man didn't throw his body down; he just dodged his head one way and another; this man was near enough to him; he could have stuck the pistol right out against his head, if he had wanted to?

A. Very near it.

Q. As you observed it there, did he ever take any aim at that man like a man would ordinarily in shooting?

A. No, sir.

112 The DISTRICT ATTORNEY. What do you mean?

The WITNESS. He never threw it up this way; he never drawed it right down and took aim, anything that way.

Mr. BARNES (of counsel for defense). The manner in which he stood after that man fell; you say that he turned pale and stood there for some moments; whether or not did he appear to be in a dazed condition?

A. He appeared to be dazed or excited, or something.

Q. He stood there for a while?

A. Apparently; for a moment *of* so he stood there.

Q. As they came up he started off, and then he was seized?

A. Yes, sir.

Recross-examination:

The DISTRICT ATTORNEY. How far apart were they when the shooting occurred?

A. They were only a small distance between them. They were not very close together or very far apart. They were, I think, 5 or 6 feet; something near that.

Witness excused.

Testimony closed.

113 And thereupon, after argument by counsel, the court instructed the jury as follows:

114 In the circuit court of the United States within and for the western district of Arkansas.—February term, 1893.

UNITED STATES *vs.* JOHN GERKO. } Murder.

Charge of the court, delivered Feb. 24th, 1893; 11:00 o'clock.

PARKER, J.:

Gentlemen, in this case the Government, representing the people of the United States, alleges by indictment that on the first day of

November, 1892, in the Choctaw Nation, the defendant, John Gerko, willfully and with his malice aforethought, took the life of Peter Carbo by shooting him with a gun. The effect of this allegation is to charge the defendant with what the law calls the crime of murder. It is your duty to find out whether that charge is true or not. You are to find, first, whether or not a crime has been committed, and, second, with equal accuracy, the character of that crime. It happens in this age and in this country that grave mistakes are often made by juries and sometimes by courts in the consideration of these questions, and because the duty is less burdensome and less responsible they will enter into a compromise with crime and find something different than the offense really is. That they
115 have no right to do. Their solemn oath requires that they find if crime exists, and then name that crime with the accuracy the law prescribes, whatever it may be. This is the only way the law can be administered, and consequently the only way that adequate protection can be afforded to the people in the enjoyment of their rights, and especially this high right to life.

It is necessary in this case that I should define to you the crime of murder, because it is alleged by the Government the defendant is guilty of that crime, and because it is asserted by the defense that this character of crime does not exist, but that if any exists at all it is one of less grade, it is necessary to define that lesser crime, the crime of manslaughter. And then, because to some extent the principles involved in the law of self-defense have been invoked, it is necessary the court should define to you that great right belonging to the citizen which is called the right of self-defense. Then, as incidental to these propositions, it is necessary to tell you what figure good character of a defendant cuts in a case, and when the law regards that character as being established; to give you the law relating to the subject of threats and the previous bad character of a deceased. These are the general propositions necessary to be noticed by the court in presenting the law to you in this case. I will endeavor to present this law to you as briefly as possible, yet it is necessary to take sufficient time to properly present these distinct propositions and to present them in an intelligent way, stripping the law of all its technical verbiage, in order that you, as sensible men, will be able to understand it as we go along. There are but three conditions growing out of the taking of human life,
116 that of murder, manslaughter, and a killing that is excusable under the law of self-defense, and you are to see whether or not manslaughter, or self-defense, or murder has an existence. If you have a definition of all these conditions and are able to eliminate from the propositions all but one of them, whatever one that may be, you can the easier find correctly the existence of that one. If, for instance, you have the definition of manslaughter, and you find by comparing that definition with the definition of the crime of murder that manslaughter does not exist in the case, you have eliminated from this judicial equation one of the propositions that grows out of the taking of human life, and you have but one proposition left to which crime would attach, which you must necessarily find to be established. If you eliminate the two criminal propositions from the case, because the evidence does not show they exist as the law requires they shall exist to make a crime, you necessarily have existing the remaining condition, which is one where there is no crime attaching; or, on the other hand, if you

eliminate manslaughter and self-defense from the case, there is nothing else in it but the proposition of murder. So, whether these principles may be invoked or not in a case, the court should give them in order that the jury may intelligently understand what is meant by these crimes as defined by the law, and then by an application of their reason they can eliminate from the case those which do not exist, and in this manner, in my judgment, more correctly come to a conclusion as to what the crime is.

Now, let us see, first, what is necessary to be found to make the crime of murder; and in doing that, as we go along, if we find there are
117 propositions not controverted, or propositions proven beyond any question, we put them aside as established in the case, and narrow the scope of our investigation in that way. The human mind is so constituted that we can reason better upon a few propositions, or upon one proposition, than we can upon many at the same time, and if we can reduce this case, or what is involved in it, to one proposition, or to a few propositions, we can the better find them than if we had a dozen or more, and, as it were, be compelled to scatter our efforts to solve the problem, to come at a true conclusion. These things I am now about to give you are all requisites; they are all necessary to be found to make the crime of murder. First, then, we are required to find that Peter Carbo is dead, because, in effect, it is set out in the indictment that he is dead, because it is charged that the defendant killed him, and that means that he is dead. Now, there is no contention over that, and if there was the evidence carries your minds to the point where as reasonable men you are satisfied of it as certain as you ever could be satisfied upon any proposition in life. Therefore, you may with safety put it aside as one of the requisites of this offence that is established. Of course, it does not make the crime because men die naturally, without the exercise of physical violence upon them, and therefore death in itself does not make the crime, but it is one of the constituent elements which goes to make up the offense, because you can not convict a man of murder until somebody has been killed. Then you may put that proposition aside in your minds as one established.

Secondly, that he died from a wound inflicted by the use of a gun
118 or pistol used so as to produce a deadly result by reason of shooting with the same; or, as we would express it in common parlance, that he died from a gun or pistol shot. Now, it is alleged in the indictment that a gun was used in producing that result. As I tell you often, because I have to tell it in every case, because every case has its own law, and these things may become tedious, you may become tired of listening to them, but we can not say to the jury, "You heard the charge the other day; take the law as in that case and apply it to this case—that won't do; every case must have its law. There may be circumstances in each case, and there are, in fact, which distinguish it in some particular from every other case. The general propositions may be the same, but there are no two cases exactly alike in all their bearings and circumstances. Now, then, it is responsive to the charge that he was killed by the use of a gun used as men use such an instrument when they shoot with it, to show that a pistol was used, that the party was killed by means of a pistol shot through his head. Upon that proposition there is no controversy, and there could not be any, because the proof shows it, and I am not telling you, really, the weight of his evidence, but I am simply reminding

you that this is a fact which is not controverted. The proof shows that the man was shot by means of a pistol, and that the bullet struck him on the left side of the head, and that he instantly died. You have but to use the rule that would govern you in coming to a conclusion ordinarily to find whether that was the cause that produced his death, if you should see that occurrence, make an absolute observation of it, because in such a case you would conclude that was what killed him, and you have a right to conclude that here, because the connection between the cause and
119 result is so intimate and so immediate that reasonable men would conclude that that produced the result when they bear in mind that that was the use of an agency which ordinarily or naturally or reasonably would produce death. You may, therefore, by the light of this testimony, put aside that proposition and safely regard it as established in the case. That is two propositions we have now which go to make up this charge.

The third one is that this violence was inflicted by the defendant—that is to say, that the act which produced the death of Peter Carbo was his act. You have no contention in your minds over that; you have no controversy over that proposition, because it is not denied, and if it was you have a state of case here that shows its existence because you have the positive statements of men who saw that act which produced the death of Carbo. That is showing it by what we call positive evidence. On this proposition it is material to find whether the defendant fired the shot which took the life of Carbo. As I have said, we have what is called positive evidence—the statements of men who stood by and saw the defendant shoot the bullet into the head of Carbo, and Carbo fell dead. Unless you could doubt the credibility of these witnesses who testify, you could not doubt—that is, you could not entertain any reasonable doubt—that the act which produced the death of Carbo was the act of the defendant. You may, therefore, put that proposition aside as established. We will lay all of these away in our minds as propositions that are established beyond a reasonable controversy. You now see that all the time we are narrowing this investigation; we are bringing it down to a focal point, bringing it down to the proposition that is in controversy, and that it is good reason and
120 good logic to always narrow the scope of investigation, that we may concenter our minds upon that which is controverted, or that which is necessary to be found and is denied as having an existence. Now, then, the fourth proposition necessary to be found is, that in addition to the fact of the death of Carbo, that he died by violence of the kind named in the indictment, and that violence was inflicted by the defendant, it must be shown that the killing was done willfully and with malice aforethought. If that is proven, if it is a state of case the law designates in that way, you and I have no discretion to designate it differently, because our duties, our oaths of office, our obligations to our fellow-men as citizens and as officers for the time being compels us to give it that designation, and there is no escaping from it, no matter what the consequences may be. You and I have nothing to do with the consequences. The law defines the crime; it gives us the measure we are to use in measuring the facts of the case, and if, when we have used that measure as the merchant uses his legal yardstick, or as the farmer uses his half-bushel to measure his grain in, the standard fixed by law—if, I say, when we measure all these things in this legal measure here and it is filled sufficiently so that

the law authorizes and commands us to say that crime is established, we must say so, just as the farmer must say, or the man who is selling must admit when he fills a half-bushel in a certain way, that that is the measure of grain that is recognized by the law as proper and correct. Now, we can not stop by simply saying that if we find it is done willfully and with malice aforethought we will find it murder, for we might make
some mistake about that; we might misunderstand what the law
121 means, and that, too, because "willful" in the law has a legal meaning, and so has "malice aforethought," and there are certain methods of finding those meanings—of finding whether they exist or not. I might with entire safety stop by defining to you malice aforethought, because wherever malice aforethought exists willfulness exists, but you would understand better, in my judgment, the crime of murder if I were to stop and give you the definition of both of them.

It may happen, and often does happen, that where a killing is willful, as you will learn by the law I will read to you presently, where a killing is willful it is also a killing with malice aforethought, though willful is not the distinguishing characteristic of murder. A man who is guilty of voluntary manslaughter kills his victim willfully—that is, if he shoots or stabs, or uses any other violent means to produce his death, and he uses that intentionally. That is what is meant by producing a death willfully. So, when he kills a man in self-defense he does it willfully. And while murder possesses this characteristic, other degrees of killing possess it also, and in order to find murder we are to find something which distinguishes it from other killings. That distinguishing trait is found in the expression "malice aforethough'," and, as I have said, if you find a case of killing that is done willfully and not done in such a way as that it can be named manslaughter or a case of self-defense, the very fact that it is so willfully done shows it is done with malice aforethought, because, as you will learn presently, one of the definitions of that characteristic of murder if the doing of a wrongful act which results in death without just cause or
excuse, or in such way as to show that it could not be reduced to
122 the grade of manslaughter, or could not be under the law justified.

Now, we will proceed to define this expression, and we will do so by reading from another charge given to the jury in another case in this court, where the law was compiled correctly and set out in such form that I apprehend we can understand it without any trouble.

"The word 'willful,' as used in connection with the charge of murder, such as that which is preferred in this indictment against this defendant, means an intentional killing and not an accidental killing. It means an act which results in death that is intentionally done and one that is not accidentally done. Now, there is a great difference in the law between that which is accidental and that which is intentional. The law fastens intent to every act that is not an accident. Every act that produces death that is outside of the definition of the word 'accident' is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken, provided it is a wrongful or criminal act, which, from its nature and the way it is executed, as a natural and probable and reasonable result death may ensue from the

execution of the unlawful or criminal act. That which is an accident in the law is something which occurs after the exercise of the care which the law requires to be exercised to prevent its occurrence."

Now, I use this method of contrast again here to find out what
123 is meant by intentional. If we can get what is meant by accidental, and everything outside of that is intentional, by excluding the definition of what is meant by "accidental" when it does not exist, we necessarily have a proposition that gives us an intentional act underlying it, or making it. It is a very easy method of reasoning to find out whether the thing we are hunting for exists, by excluding every other condition, everything else that may be the antipodes or the opposite of that conclusion. That is the reason why it is necessary in this case to call your attention to the fact of what an accident is. After we have exexcised the amount of care the law requires us to exercise, and something occurs beyond that which causes death, that is not a crime; it is what the law calls an act of misadventure. But whenever we fail to exercise that amount of care that the law exacts of us, we get into the region where intent exists, and where intent characterizes our acts.

"When a man exercises the amount of legal care exacted by the law, and something occurs beyond that, that is not his willful act. The law recognizes that he does not do it willfully. But when he does an act which naturally, or reasonably, or probably, from its nature and the way it is done, produces a certain result that is held to be an intentional result, because the act as done in that way is intentional; and whenever the act is done, and it is an act that may naturally or probably produce a certain result, whenever the act is done intentionally the result is intentional."

Now, this example, of course, has reference to the case before us, and if
we find that the case before us presents the facts which are used in the
124 example as an illustration, we have a state of case that would authorize us in finding that the act of the defendant in shooting Peter Carbo was intentional, and if it was intentional it was willful, because intent in the law means willful, and willful means intentional. It does not necessarily mean, I remind you, that the result was intended. As, for example, take a case where a man may shoot along a crowded street; he knows no one there; he is a stranger; he is a desperado from the backwoods, and comes into the town and is panting with a desire to show the bravado which characterizes his act, and he fires along a crowded street. In such a case there could not be any specific intent to kill anybody, because he didn't know anybody. But the law says to him, if he kills, you intended doing that act because it was not an accident, and because you willfully did an act which naturally, or reasonably, or probably may produce death, and you are held by the law to have intended the consequences of your acts; and whenever the law holds you to that intention it holds that you willed the consequences. That is a case where the party did not have a specific intent to kill.

"For example, if a man presents a gun at another and fires it at him, the fact of drawing the gun and presenting it shows that he wills what he does, shows that that act is a willful act upon his part. And when that state of facts exists, the act of presenting and firing the gun is recognized by common experience and common observation as a willful act."

Why? Why is it recognized as a willful act? Well, in the first place, it has been so long recognized by the good and intelligent members of mankind, that by common observation it has become an established
125 rule; but in the next place, we know that this gun, while it is most deadly in its character, while it is made for the purpose of the destruction of animal life, and it is made by the constructor so as to subserve that deadly purpose, we know that it is inanimate; we know it has no volition; we know it is without will power; we know it can not draw and present itself at a human body; and we know further it can not pull this thing that sends the deadly missile into the vitals of the victim. The fact of going and getting a gun, of preparing it, the fact of drawing it and presenting it, the fact of pulling the trigger, shows to the intelligent juror such a condition of facts as to prove beyond peradventure, beyond cavil or conjecture, that there is some intelligent agency that does the act. There is somebody's mind behind it; somebody who can deliberate, premeditate, and reason, so that these things may all be concurrently done, and that they may produce the deadly result. It shows, when we have that act, therefore, that there was some mental action, and the existence of that mental action to produce these concurrent acts shows willfulness upon the part of the party who produces it. Therefore, when you have an act of that kind, there is no trouble in finding that the death is willful. Why? "If that act produces death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed the result. Now, intent is something that can be found only be inference." It is a condition of the mind that is invisible. We can not apply to that condition any one of the five senses—that is, we can not see it; we can not hear it; we can not taste it; we can not touch it; and we can not smell it.
126 Whenever we can apply directly to a *por*position, or to that which we may be hunting for, any one of those five senses, and in that way get at the knowledge we are seeking for, we have positive evidence of it, either as coming from ourselves or from other witnesses who produce it before us in the shape of testimony. But you can not prove the condition of the mind in that way, and I often think how foolish, how irrational and unjust it is for men to say, as I have often heard it said, they would never convict anybody of any crime on circumstantial evidence. All the crimes that seriously affect society, and that seriously affect the rights of men, have in them this thing of intent, and juries are required to find it, and if you can not find it by circumstances I want to know how in the name of common sense you can find it. If you can not find it by positive proof you must necessarily find it by circumstances, or you can not find it at all. This expression frequently comes from men who do not know what circumstantial evidence is; they do not know they breathe by the light of circumstances; they do not know that the very condition surrounding them is a circumstantial condition; they do not know that all the great truths upon which men rely and depend in this life, that affect their existence and their lives and their characters and their relation to society here, and that will affect their existence hereafter, are only capable of circumstantial proof. They forget that. If they know better it is simply a way of evading the duty that rests upon them as citizens, a duty that rests

upon the shoulders of each of us, and a duty we are all commanded to obey, to uphold the laws and assist above all things in enforcing them, because it is by the enforcement of these laws alone*m* that
127 men can secure protection and consequent happiness. There is no other way. It is exactly like a condition where a man can ride the stormy billows in mid ocean, among its rocks and icebergs and all its dangers, if the deck of the vessel is strong enough to overcome that terrible condition, and he can stand upon it, and when the lightnings are playing around its mast, and the seas pile around him mountain high, and every instant may be his last, he is in entire security, because all is safety on the deck of that vessel; and it is like that when we look at the law. All is safety and security upon the deck of this legal vessel, provided we have at the helm those as officers and captains who will direct the legal vessel to ride the storm and surmount the dangers which surround it. But if this is not true, all is danger, and the billows and waves of mob violence and commotion, bloodshed and anarchy and confusion overcome us, and we are engulfed beneath them. Men who are of that opinion are not capable nor competent to occupy a position on that vessel and to direct its course.

"Intent is something that can be found only by inference. It can only be found by the circumstances in the case, by the nature of the act done, and the way it was done, and the character of the weapon used, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason, when a man presents a gun or a pistol at another and shoots it at him, the law says he intends to kill him, because the killing is a result that is natural, or
128 probable, or reasonable."

You needn't go any further to hunt that proposition, because the killing is a result that is natural, or probable, or reasonable, and the law holds him to have sufficient intelligence to know that would be the result. And I say, when you find that condition is shown by the proof, that a man has presented a gun or a pistol at another, within shooting distance of him, and fired it, and that gun has in it a leaden bullet or deadly missile, you need not go any further than that to find the killing was an intentional killing and a willful killing.

"So, in a case of that kind, when you are called upon to find whether he intends to kill or not, you find, first, whether he presented the deadly weapon in shooting distance of him, and fired it at him, whether that was a willful act, and when you find that (as I have told you) from the character of the weapon used and the manner of its use, because the weapon can not use itself; it can not present itself; it can not pull its own trigger; it can not, of its own accord or of its own will power, because it has none, send the deadly missile in the body of the man who is killed; there is an intelligent will power that does all that. I say, when you find a gun or pistol that has been held in that attitude and that it has produced a deadly result, as reasonable men, as men of common knowledge, of common observation, you must come to the conclusion that the party willfully did that act, and when he willfully does an act of that kind he willfully produces the result."

Now, let us see how you may find that the act was willfully done.

"The presumption that the law recognizes is, that a man is held to have intended the natural and ordinary consequences of his
129 act. Every sane man who is a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended to so destroy such person's life. So, if the direct tendency of the willful act is to do another some bodily harm, and death in fact follows as a probable consequence of the act, it is presumed that he intended such consequences, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life, or to do some great bodily harm to the person assailed, the intention to take life or do him some great bodily harm is a necessary conclusion from the act."

And upon that point I repeat, for an example, take the act of shooting, and if you find that a party drew and presented a pistol and fired, and in furtherance of the facts showing the conclusion you are seeking after you find that he fired more than once, you may consider that: that is, to find out whether he intentionally and willfully fired. If he willfully fired at the man that is an act that may naturally and reasonably and probably produce death. In this case it did produce death, and therefore, if he willfully fired upon him, he willfully killed this man who is alleged to have been killed. That is the definition of willfullness as used in the law and applied to a case of this kind. That is how you may find its existence. I say in this connection again, before proceeding to
130 define the expression "malice aforethought," if this willful killing was done in such a way as that under the law I am giving you, if it is not a case that is excused, and consequently under the law of self-defense, nor is it a case that is so mitigated as to be denominated manslaughter, from the fact that it was willfully done, you have the condition established which shows that it was a wrongful act done without just cause or excuse, and in such a way as to show the absence of mitigating facts or justifying facts, and it is consequently murder.

Now, let us see what is meant by malice aforethough'. It is necessary to take that phrase up and find how the law regards it. We understand what is meant by the ordinary word "malice." We understand that means hatred against another. It implies a special condition, and if a man undertakes to satisfy that malice against another, he has, and there is the existence of, a specific purpose to do against that other whatever he does do, or intends to do. If he burns down his house because he has malice against him, personal hatred against him, we see the doing of an act which evidences the existence of a specific condition. That is narrower in its meaning than the phrase "malice aforethought," because malice aforethought may be generated by a condition where there was no special spite, or grudge, or ill will, as you will learn presently from the law I will give you. It may not grow out of that condition at all. It may have its origin, and the very seed from which it germinates may be general malevolence, which is recognized by the law as a condition when possessed by a party that shows that that party does not care whether men live or die, he is that

reckless of the existence of human life. He has no regard for the high
131 duty that rests upon all of us, and the very highest duty that can rest upon us, short of our duty to our God, and even the highest duty we owe to our God is to protect the rights of our fellow-men. God does not need any obedience from us; we are nothing but His creatures. The great duty, the great law as contained in the great command is to do unto others as we would have others do unto us. When you do that you have obeyed your Maker, and you have supplied all of the requirements of the Ten Commandments; you have obeyed them all to the farthest extent, and you have obeyed the civil law of your land. It is our duty not to destroy life, but to protect it. In furtherance of that, when you see the life of your fellow in danger from being run over by a locomotive or a wagon you rush instinctively to his rescue, and you would even risk your own life to save his. This is done in obedience to this law that came to us as the result of the principles that are instinctively in us, put in us by our Maker, and they will control us unless we smother them, paralyze them, destroy them by our own false conception of what man is so that we become reckless, and instead of our minds being controlled by these high principles which prompts a sense of duty and obligation to our Maker and fellow-man we are governed and controlled by general malevolence, and if we kill in consequence of it, though we may have no specific hatred or animosity against the party we kill, still it is a case where murder exists, because it is the doing of a wrongful act without just cause or excuse, done because of this general malevolence, or recklessness, or hatred of mankind. Malice aforethought may grow out of either condition. If there is in a given case on trial a condition which shows specific cause for the execution of the act which results in death, then you can attribute
132 it to that, although you need not find it to make malice; you are not required to hunt for motive to find malice aforethought. And above all, as I will show you from the law presently, you are never required to find that the motive for a killing is adequate, because it can not be. You can not find any motive in the estimation of a just man that is adequate or proportionate to or with a killing that is murder. There is nothing on earth that can be adequate to that—nothing in the estimation of a just man. Let us now go back to this definition: "This, like 'willful' must be proven by circumstances, because it is a condition of the mind, and we must find some way of getting at that condition that is possible, that is reasonable, and that is just. We can not do it by the light of positive evidence." We can have proven to us a condition by positive evidence, and we may take that condition and reason back from that and find what the condition of the mind was that prompted the act. For instances, in this case, we have the act of shooting by the defendant proven by positive evidence, by the statements of witnesses who stood by and saw the act of shooting, and that is so near the thing itself that it is regarded by the law and named by the law as positive. We can take that condition and reason from that to the condition of the mind that we are hunting for, but that is a circumstantial method of getting at it, the only method we can adopt. "If we can not fathom it, if we can not penetrate its inmost recesses to see what is going on there, we must adopt some other means that are reasonable, some other process that is rational, to get at the mental condition of the party, because both of these characteristics of murder

spring from the condition of the mind of the party. The law says
133 we may do it by circumstances. We may do it by reason of the character of the act done, the manner in which it was done, and we may solve the condition of the mind by the light of the facts and circumstances that surround the act going to characterize it, to show what manner of act it is, bringing to bear upon a condition of facts of that kind the observation of men of mature judgment, of men of intelligence, of men who, because of the amount of information they possess, are to the greatest extent qualified to discharge the great and responsible duties devolving upon them as jurors. As I have remarked to you before, when malice aforethought exists, murder exists."

If the facts show that it exists in this case, or that Peter Carbo's life was taken willfully, and this other element surrounding the transaction known as malice aforethought exists, the killing would necessarily be murder and nothing else. Now, what is this element of this crime? "It is defined by the law in a general way to be the doing of a wrongful act without just cause or excuse in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give the party the right to defend against it; or that it was done in the absence of mitigating circumstances. And it is defined again as the doing of a wrongful act without just cause or excuse, and in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent upon mischief. Let us see how the law defines it, and then again how the law tells us it may be found to exist. It can only be found by circumstances, because malice aforethought, like willfully, is something which exists in the mind that is necessary to
134 be found to make up the elements of the case, and as you can not get into the mind to know what is going on there (and you could not tell what was transpiring there if you could get into it,) you must learn it in some other way; and there must be some rational way by which you may learn it, some way that rational men would adopt, because you are not authorized to adopt any other method than that which is reasonable in arriving at conclusions, and there is a reasonable way, which is the way that the law recognizes as a proper way by which men may arrive at conclusions. It is from the nature of the transaction, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what was the nature of the thing done, whether it was an innocent act, or a criminal act, and, if a criminal act, what was the nature of that criminal act.

"'Malice aforethought is the grand criterion which distinguishes murder from other homicides, and it is not so properly spite or malevolence to the deceased in particular as any evil design in general; the dictate of a wicked, depraved, and malignant heart; a purpose to do a wicked act; and it may be either expressed or implied in law. Express malice is when one with a sedate, deliberate mind, and formed design, doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menances or former grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, as when a man willfully poisons another. In such a deliberate act the law presumes

malice, though no particular enmity can be proved. And if a man kills another suddenly, without any or without a considerable provocation, the law implies malice, for no person except of abandoned heart would be guilty of such an act upon a slight or upon no apparent cause.'

"Malice is an intention to do bodily harm; a formed design to do mischief. It has also been defined as a deliberate intent to kill."

A man has a deliberate intent to kill in the absence of a right to kill under the law of self-defense, and in the absence of that which would mitigate the offense to manslaughter. He can not have a deliberate intent to kill and then say that his offense was only manslaughter, because the fact that he had an intent to kill implies that he deliberated over that purpose, that he prepared himself for it, and, as you will learn further on, where deliberation, premeditation upon a purpose to slay, where previous preparation to execute that purpose exists, there is banished from the case that condition known as manslaughter, because that grows into existence upon sudden impulse, without previous preparation to take life. Whenever that exists we have malice, and nothing else, unless it is a case where a man prepares himself for self-defense, and then in order to exonerate himself from that killing he must execute that preparation where the law gives him a right to do it, and in a defensive way; he may prepare himself for self-defense, but if he kills when there is no case of self-defense such act of previous preparation becomes criminal in its character because of his subsequent act, and it becomes attached to that act. "It does not necessarily import especial malevolence toward the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit; a heart regardless of social duty, and a mind deliberately bent on mischief. It imports premeditation. Therefore, there must logically be a period of prior consideration . . . ;" because that is what premeditation means—prior consideration—thinking of the purpose to kill—revolving it in the mind of the party, and evolving the act of killing from that principle purpose so evolved in the mind, "but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvellous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision." Miss Martineau says she talked with a sea captain once who told her of what occurred in his mind when he had gone down, having fallen overboard. He had gone down twice, and everybody 'ho knows anything about it knows he had but one more time to sink, and he knew it; and from his conception of the surrounding circumstances he must have gone down and come up again in a few seconds, yet he told her, and she has put it of record, that in that period of time every event of his lifetime from his earliest recollection as a boy came before his mind, and he reviewed all of them. That shows with what wonderful power the human mind can act, the wonderful rapidity of its acts, and demonstrates the mighty machine which controls us and directs us in our movements here. "Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed as a

deliberate intent, though after no matter how short a period of reflection, it none the less is malice." Now, this intent to kill may exist contemporaneous with its conception in this day. It is not like the old days of the matchlock, as they call it, where a man had to carry a coal of
137 fire in order to fire the gun, and then came into existence a wonderful improvement called a flintlock, and many of us remember that, but we had to stop long enough to prime the pan, as it is called, because we could not carry priming in the pan, for the reason that it would loose out, and if we got into a difficulty and had a purpose to kill somebody we would have to stop and prime the pan before we could execute that deadly purpose. And then came into existence the cap and ball, which was a great deal better, and the execution of a criminal design could be almost cotemporaneous with the purpose to kill, but since this last and greatest improvement in firearms a man can conceive a purpose to slay and execute it, as far as our observation goes, cotemporaneous with the conception of it. We know that, and everybody is familiar enough with firearms to know that. And if a man has a purpose to kill formed at the time, and he then and there executes it with this deadly engine, this engine of death and destruction to human life, executes it at the moment he forms it, that is premeditation and it is malice aforethought, unless it is a case where he had a right to kill, or unless it is a case where manslaughter exists. We take that condition, and if there is banished from it manslaughter and self-defense, there is premeditation, there is prior consideration, there is deliberation, and there is evidence, as you will learn after a while of this state of mind from the selection and use of the deadly weapon itself.

Malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time.

138 "You can not tell by direct proof the condition of the mind, bearing in mind the distinction between these two kinds of evidence, positive, or direct proof, and circumstantial evidence. Positive, or direct proof, is the proof which shows the existence of the very thing itself that you are hunting for."

"If, for instance, it becomes necessary to show that A shot at B, and C comes in and says that he saw A shoot at B,"—or, in this case, it is necessary to show that John Gerko shot at Peter Carbo, and these witnesses come in here and they say they saw him shoot at him,—"that is positive evidence of it, positive proof of the shooting, of the fact necessary to be found, and because the fact is so near the thing itself it is called positive evidence of it. When it is further off from that thing, but is still evidence standing around the thing done, it becomes circumstantial, or, in other words, circumstantial evidence. Circumstantial evidence is proof that may be equally cogent and equally powerful proof of the existence of the thing, but it is not the thing itself, but is that which shows its existence in the shape of the surrounding facts and circumstances, in the shape of that which attends every transaction in life, which goes to characterize it one way or the other." That is to say, we take the circumstances that surround the thing and we look at them, and in that way we can tell what sort of an act it was, tell what sort of a purpose the party had in doing that act. That is the usual method of getting at it. You want to

find out whether a certain thing is true, how a thing was done, if it existed at all; you want to know that. You can not know it except by the things that are left around that occurrence, that act. You look
139 at that, and you judge of them intelligently, dispassionately, and reasonably, and if they bring you to the conclusion that the thing was done, and it was a thing of a certain character, you come to the conclusion from these circumstances that that which you are hunting for exists.

Now, that is the usual way of getting at a thing. There is no mystery about the law. It is as plain as the A B C's. Its methods are simple, when we strip it of all its verbiage that is thrown around it. It is a system of simple rules, easily understood, and as easily applied if we are diligent in making the correct application. I repeat, "circumstantial evidence is not the thing itself, but is that which shows its existence in the shape of the surrounding facts and circumstances, in the shape of what which attends every transaction in life, which goes to characterize it one way or the other, which goes to show either that it was a criminal act, a criminal transaction, or that it was a transaction that was honest and upright, and void of crime."

"There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible and direct witness to that, and if he meant so to testify he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to anyone outside of the individual, exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind, and the feelings of his heart, by a careful study of the acts which the individual performs, and all the other external indications which he may have given
140 of what his state of mind and heart was. As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances, no case in which it is demonstrated as express.

"It can not be demonstrated as express.

"We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is from our common experience presumed to have anticipated that result, and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant; and thus we frequently find the statement laid down in reported cases and by text writers, that malice is to be inferred from the use of a deadly weapon."

I think that needs some modification. It is like the proposition that has been declared always in the law, but it is now attended with an illustration or further explanation of it, and that proposition is this: That the proof of killing shows murder. Practically speaking, that is true, because

the very proof which shows the killing either shows the method of the killing, and that method will show malice aforethought, or, if it does not show the method, because the body of the person may be obliterated, may be destroyed, as has been the case often, and you can not find the
141 character of the violence used and the manner of its use, and you could not then, from the manner of the killing, find malice aforethought, but if the body is destroyed, the very fact of the destruction of the body by the party who kills shows a criminal condition of the character that would drive out of existence manslaughter or self-defense, because men who would commit a lesser crime or do an act that would be justifiable would not usually act that way. Therefore, it is correct to say that the proof of the killing shows malice aforethought and consequently murder, when you consider this state of case that I have named, and further consider there is out of the case that which would make it manslaughter or self-defense. If these two conditions are out of the case the evidence which shows the killing would show murder; and it shows it more clearly if you have evidence showing the use of a deadly weapon in such a way and under such circumstances as to show it was not rightly used in the law, or used in a way that would mitigate the killing to manslaughter. If those conditions are out of it, I say, from the willful and intentional use of the deadly weapon you have malice aforethought, as I told you before we proceeded to define what malice aforethought was—that a willful killing in the absence of that which would justify or mitigate a killing would show malice aforethought and show murder, and it is a state of case where the proof showing it was done willfully would show it was done with malice aforethought.

"Malice is to be inferred from the attendant circumstances which surround the transaction, and the jury have a right and it is their duty to look at these attendant circumstances to see what character of act it was,
142 to see what was the condition of the mind of the party or parties who engaged in that act, as being the only way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought or the converse of that, in which there was an absence of that element of the crime of murder."

"Now, anything that shows deliberation, anything that shows a premeditated purpose to do a wicked or willful act that might result in death, is evidence that may be considered by the jury as evidence of malice and of the existence of malice aforethought. For instance, the law lays it down as a principle if premeditation is shown, if the purpose to kill directly existed in the mind of the party or parties who killed, or the purpose to do a willful act that might result in death is shown by the actions of the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought, provided there is an absence from the case of that state of facts which goes to show the party had a right to do what he did do, or that there were mitigating facts that would give him a right to claim that his crime is only manslaughter. The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehend, and whenever a party deliberately selects and prepares himself to take life by hunting up a deadly weapon and arming himself with such deadly weapon, preparing that deadly weapon so he can use it in a deadly way, if there is

not in the case a condition that gives him a right to use that weapon in self-defense, then there is not in it that intermediate condition, because there is too much deliberation about it, there is too much premeditation, there is too much evidence of a preconceived design to kill that does not exist in manslaughter, because it is something that springs into existence upon the spur of the moment because of some provocation offered by the party who kills at the time of the killing or so near thereto as that the party did not have time for the blood to cool, and the deliberate selection, preparation and use of a deadly weapon shows cooling time sufficient."

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Now, I have given you the general definition of malice. I have told you it shows a purpose to do a wrongful act without just cause or excuse, and I have given you the way that you may find its existence. You are, therefore, to go to the killing; you are to ascertain how the killing was produced, the way it transpired, the way it was done, what character of weapon was used; you see whether that weapon was prepared beforehand or not, whether it was deliberately and willfully used at the time, and in a state of case where the evidence shows that the killing was willfully done, or, as I have already said, there is an absence from the case of that which shows that the party had a right to willfully kill under the law of self-defense, or that the killing was willful, but that there were mitigating facts attending it, the proof which shows it was willfully done shows it was done with malice aforethought, and in a case of that kind the very same degree of proof that shows a willful killing would show a killing with malice aforethought. These, then, are the two elements which make up this crime of murder; that is to say, that the act was done willfully and done with malice aforethought. I hope I have made myself understood in giving you the definition of these expressions.

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It now becomes necessary to give you the definition of manslaughter. That crime is defined by the statute of the United States, and it is the only crime against life which is defined. The statute does not define the crime of murder at all, but it leaves us to the definition known and recognized by the law and in existence at the time of the passage of the statute in 1789. The statute of the United States defining manslaughter was passed since that time, and it says that "he who willfully and unlawfully takes the life of another without malice aforethought is guilty of manslaughter," and that is exactly in harmony with the common law definition. "He who willfully takes life," that is voluntary manslaughter, and it involves one of the elements of this crime that I have already defined to you, but it does not involve the characterising element known as malice aforethought.

"Where, upon sudden quarrel two persons fight, and one of them kills the other, this is voluntary manslaughter. So also if they upon such occasion go out and fight in a field, for this is one continued act of passion. So also if a man be greatly provoked by any gross indignity, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide."

The law in elaborating upon that proposition takes occasion to tell us what gross indignities would mitigate the killing to manslaughter. For instance, a man kills another in the act of adultery with his wife. There is no blow there, but there is an indignity, an insult, and an outrage that

is worse than all the blows that could be hurled upon or against him. The law says under such circumstances he is guilty only of the
145 crime of manslaughter, because that is a gross indignity that is very provocative in its nature, and the law considers his condition of mind and commiserates him. But in a case where an affray is claimed to be existing, it must be an affray, it must be a condition existing at the time where there are actual blows being exchanged, there is actual violence of the kind being used between the parties.

Where, for example, two men engage in a fist fight, a fight with their hands and fists, and without previous preparation upon the part of either, and one of them suddenly draws a deadly weapon and uses it and kills his adversary, the law contemplates that he did it under *such* condition that his mind was inflamed by the blows of his adversary, and consequently he is commiserated to the extent that his crime is reduced to a less grade than that of murder; but if he prepared himself beforehand, with the intention *of* drawing another into an affray in order that he might shoot him, that is murder. And this condition of mind can not grow out of mere words, because mere words are not sufficient to justify even a blow with the hand or fist; they can not do that; they are not of that character. Words are like the wind; they pass away and do not hurt the man against whom they are hurled; they hurt the man who utters them. That is the phil*o*sophic and proper view to take about that. The law recognizes it, or at least it recognizes the public peace as so great that it is not to be disturbed by the use of words, and there can be no mitigation of the crime because at the time of the killing words were used. If there is an affray existing, if violence has been exerted of a character—it may not be of a character to kill, but to inflict injury upon a person, and to inflame the mind, and in the midst of that violence one of
146 the parties engaged in it suddenly draws a weapon and uses it, that is manslaughter; but if the violence has been threatened before but not inflicted, but has passed away, and the party selects a weapon and prepares himself, and hunts up his adversary and slays him, that is murder. There is no manslaughter in that. There can not be. There is deliberation there, because the fact of selecting the weapon; the fact of preparing himself; the fact of exercising this character of deliberation shows time for the cooling of the blood, if there had been an affray that would have inflamed it. If there had been no affray, but simply the use of violent words by the man killed, that could not be said to produce that condition of a heated state of the blood that would cause the law to look upon the act as simply manslaughter. Now, I say in this connection, there must be banished from the case of killing the condition where a party has previously prepared himself for the act. If I prepare myself with a deadly weapon, and I enter into a fist and skull fight with an adversary with the purpose of using that weapon, as evidenced by my preparation of it, and I do use it if I have a chance, I am guilty of murder. It does not make any difference how many blows may be rained upon me; it does not make any difference how excited my mind may become, because there was a period when I laid the foundation for the execution of a deliberate purpose before any blows were delivered, and that period is to be taken into account by the law, and you are to go back to that period to see whether or not there

was deliberation; whether there was previous preparation. The law commiserates a man when the killing springs into existence suddenly,
147 because of an inflamed condition of mind growing out of a sudden affray and of violence received, of an injury received that is not of a character sufficient to justify a killing, but is regarded by the law as being of a character sufficient to inflame the condition of the mind of the party. But I repeat, if that affray exists, if that condition exists, and there is time for the party to deliberate afterwards, for him to contemplate his duties, to avoid a conflict, or a meeting with his adversary, but he does not do that, but prepares himself with a deadly weapon, hunts up his adversary, challenges him to a fight, and while that challenge is being deliberated upon, or accepted, if you please, by his adversary, he kills him, that is murder.

Now, the other condition called self-defense is a condition where a party had a right to commit the act under the law. It is a condition that the law creates and recognizes as existing because of necessity—because of the necessity of the case. It could not be a just law of necessity if I could kill my adversary, or kill another man, when my life was not in danger, because it is to be the last remedy we can fly to. It is a remedy executed by a single man and by an interested party. I do not refer to this that you are to deprive him of the right in a case where he is entitled to it under the law, but I simply call your attention to what his duties are, referring your minds to the extraordinary condition to remind you what his duties are in the premises, because he has duties. We all have them, and we can not shake them off; we can not avoid them; we can not cast them from us. They rest upon us as long as we have that consciousness that gives us a conception of right and wrong; and man when confronted by danger, even, still has resting upon him great duties, and when he is
148 occupying this position that he claims is a purely defensive one, he is occupying exactly the position that all the officers of the Government combined occupy in a Republic, in a Government of the people, by the people, and for the people. The powers of the Government are necessarily distributed. They are not all concentred in the breast of one man, as in the autocrat of Russia. That is not the kind of government that the people of this country, or the people of any country, in this enlightened age want. They do not think it is safe; that such a man might become a tyrant; he might be a good man, and give a most estimable government with all the powers concentred in him, but along may come another and give us just the opposite, because of his disposition or nature. The powers of this Government are divided among different departments. When you sit here and pass upon these cases the court gives you the law, but it does not make an application of it to the facts, for that is your province. The court does not find what the facts are, for that is your duty. When you have received the law you make an application of it to the truth as you find it; then you find a verdict, and there your duty stops; you are done. You belong to the judicial branch of the Government. The court then, as a member of that branch also, after having given you the law, takes up the case again, and it formally enters up the result of your finding in the shape of a judgment in a criminal case, of a decree in a civil case, and there the duty of the court stops. The power to execute that

judgment is passed over to another branch of the Government. In this way greater safety is secured, greater guarantees are thrown around
149 the rights of the people. That is the purpose of it.

Now, when a man stands in the attitude of a defensive citizen and takes a human life he is in the attitude of one having all these powers centered in him, because he is the jury finding the facts. He must do that because he can not take any life without any finding of facts, without any conception of facts; he must pass upon the condition surrounding him, and you are to take his condition into consideration in passing upon his case. When he has found the facts in that respect as a jury he then and there sits as a judge, finds the law; and again he goes back into the jury box and he applies the law to the facts. Then he takes the bench and enters up a judgment, and then he, as the marshal or sheriff or as the executive officer, whatever it may be called, executes that judgment, and takes the life of the man. Now, is not that an extraordinary power concentred in one man? We work for days here in finding facts and in knowing the law and in entering the judgments, and then the other officers take the case in hand, and whatever follows that judgment they execute. This citizen is in that attitude, and he is required, I repeat, to exercise his duties in the premises. You are to pass upon the question ultimately as to whether or not he had a right to do as he did do. That is your province; that is your duty. To find out whether he had a right to do that or not we must go to the law, because it would never do to leave the execution of this mighty power concentred in one man to his conception of right or duty alone. That would be anarchy and destruction of the strongest character. We must go to the law to find under what circumstances he may kill, and it contemplates a state of case that is in existence
150 at the time, was then existing, was immediate, was then and there impending, and that he could not escape from it, because it is a law of necessity, and it must be a case where he could not save his life except by doing as he did do. If he could save his life, though there was a state of violence impending, though there was a state of deadly violence confronting him—if he could save his life from that, as you will learn, under this law he must do so.

The first proposition of the law is, where there is danger at the time of the killing, danger to his life, danger of a character that he could not avoid, where a man is in the lawful pursuit of his business—that is, he is doing what he has a right to do—and he is attacked by another under circumstances which denote an intention to take away his life, or to do him some enormous bodily harm, may lawfully kill his assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. First, he must be doing what he had a right to do. If he arms himself, prepares himself for a deadly conflict or deadly act, when such was not necessary to protect himself, then he was not in the lawful pursuit of his business, and there would disappear from the case the very first proposition upon which rests this law of self-defense, because he must be doing that at the time that he had a right to do, and while he is doing that he must be attacked by another. What sort of attack? By the use of violent words against him? By the use of threatening gestures of the hand or fist? Not at all; but in such

a way and under such circumstances as denote an intention to take
151 away his life. This is a law of proportion. One life is put in the scale and weighed against another life. That life is not to be put in the scale and weighed against some remote danger that may come in the future; it is not to be put in the scale, although it may be danger to life, and weighed against danger that would not jeopardize life because not immediate. It is not to be put in the scale and weighed against danger, even though it may be danger to life, that may be past and gone. It must be then and there existing, under this proposition. It must be danger to life. It must be real and actual under this proposition. It must be danger that was not created by the act of the defendant at the time of the killing. It must be danger that sprung into existence from the act of the party killed, and, in addition to all of these things, it must be danger that he could not avoid by the exercise of that reasonable care and prudence that *me* might have exercised under the circumstances. If that condition exists he would have a right to slay. If it does not exist he does not have a right to slay.

Now, the other proposition is a proposition where the danger may not be actual, may not be real; it may be only apparent danger, but there must be in existence such actual facts and circumstances as a foundation for this conclusion as that a reasonable man would believe that the danger was actual, was real, was then and there in existence, and that it could not be avoided except by the defendant doing as he did do. Now, when, from the nature of the attack—that implies there must be an attack made, under this proposition of apparent danger—there is reasonable ground to believe that there is a design to destroy life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although
152 it should afterwards appear that no felony was intended. The very first proposition involved in this one is that there was an attack made of some kind, that from its character and the way it was made, and the nature of the weapon used it seemed to be a deadly attack, although it may not be that. The illustration given of that is that A shoots at B, and B seeing what seemed to be a preparation for a recurrence of the act upon the part of A, shoots A and kills him.

Now, then, the question there would be only what were the facts and circumstances that led up to the shooting? Did he form such a rational conclusion from these acts as you would form, or any other reasonable man; and, if so, because there was that upon the part of A which seemed to be an attack, an act of violence upon an exact parallel with an act of violence which kills, and although it might turn out afterwards that A had no load in his gun, and could not kill, but he fired it just the same, he presented it in the same way as he would if he had meant to kill, exactly as men usually do when they go to slay; and if that was the case, and it could not be avoided, or seemed to be danger that was about to be repeated and could not be avoided except by taking the life of A, B would have the right to take it. But suppose there was no demonstration of the kind made at the time of the killing; suppose the party did not have the power to kill, did not have the means to kill; that he made no demonstration that would indicate a purpose of violence at the time—a person killing under such circumstances would be guilty of a crime, and there is no question about it, and he would be guilty of the crime of murder, if there was

no violent demonstration made that threatened the person, or that
153 threatened to inflict injury upon that person, and under that proposition he could not conceive a state of danger, he could not bring it into existence and act upon it, without there being a foundation for that conception that you are to pass upon the circumstances of, in the shape of an act of violence or apparent violence upon the part of the person he kills, at the time of the killing.

I am asked by counsel for defendant in this connection to give, as bearing upon the subject of previous preparation, the following: That preparation in the heat of blood may be followed by manslaughter as well as under a certain state of case it may be followed by murder or self-defense. The court modifies that proposition by saying to you, that if a party prepares to defend himself in a case where he could defend himself, he has a right to do that; but if he prepares himself as I have already told you, and then executes a deadly purpose by killing under circumstances where he would have no right to kill, where there was an absence from the case of the right of self-defense or an absence of the mitigating conduct that I have given to you that would reduce the grade of the crime to manslaughter, then the fact of his previously preparing himself shows deliberation for a deadly criminal purpose, and there could not be manslaughter under such conditions as that. He may prepare himself, as I have already told you, to defend himself in a proper way, but because he has prepared himself to act upon the defensive, if he afterwards abandons that purpose and kills, if he has no right to kill in the absence of facts that would give him the right to defend, then the fact of previous preparation becomes evidence of deliberation, evidence of design. As I have already told you, manslaughter can not spring out of a state of case where a man pre-
154 pares himself to kill wrongfully, when he prepares himself to take human life when he has no right to do it. That is evidence of malice aforethought, and it is the distinguishing line between manslaughter and malice aforethought.

Now, there are other propositions involved here underlying this principle of self-defense I have given you. Notwithstanding there may be a case of deadly danger existing against a party at the time he kills, his conduct may be of that character that he is deprived of the right of self-defense when confronted with a condition of that kind. Of course, if he is not confronted with that condition he has no right to kill under the law of self-defense, but if he is confronted with that condition, and that condition is one that he seeks and he hunts the party, that cuts him off from the right of self-defense, because a man when he hunts up a party, hunts up an occasion to kill; he is not seeking to avoid that danger that the law says he must avoid if he can do so with due regard to his own safety. A man can not exercise this right of slaying a human being in such a way as so destroy his life if he seeks an opportunity to slay. The law gives us the circumstances that will cut a man off from the right of self-defense, because of his own conduct. The law is recognized as the law of necessity, where the condition is brought upon him and he could not avoid it. The first general proposition to be noted is that a person who has slain another can not urge in justification of the killing the necessity produced by his own unlawful or wrongful act. If he arms himself, prepares himself for a deadly encounter, and then hunts up his adversary and challenges him

to fight with him that he may have occasion to kill him, there is
155 no self-defense for him; it does not exist, no matter what the adversary does. In this connection, before proceeding to these principles, it may be proper to remind you that this state of apparent danger, as you have learned from the language of the law, must grow out of that condition which is an attack, or apparently so, of a deadly character upon a person.

Now, the mere fact of holding the hand in a certain position, especially if the party was in the habit of holding it that way, is not a demonstration that would give a man the right to slay another. We would all come in under that rule, because we all have peculiarities of holding our hands in our pocket when we are talking. Things of that kind are not sufficient to justify the belief there is to be a violent demonstration made upon the part of the party, and a man can not slay upon that. Now, I say to you, and it is the law, that if a man hunts up an adversary and challenges him to a contest, to an ordinary fight, or to a mortal combat, and the other one may accept that challenge, or he may prepare to accept it, and the party has challenged him that he may kill him if the opportunity offers, as evidenced by his previous preparation, there is no law of self-defense: that is deliberation; that is premeditation; that is thought of beforehand, and that is malice aforethought. If he arms himself with the purpose of killing his adversary upon sight, or when occasion offers, because of previous threats, or because of previous provoking language, you will learn presently, that things of that kind do not justify a killing, but, on the other hand, they become items of evidence to be considered against a man as showing a specific cause for the killing, as showing that it was thought of beforehand, because of the use of these words, or of this act done
156 beforehand, and the act done, if it was an act of actual violence received, provoking in its character, or an act in the shape of an assault upon the other provoking in its character, if there was time for the party to deliberate afterwards, time for him to avoid the conflict, it is his duty to do so, and the fact that he had time to deliberate may be found in the existence of the fact of the purchasing or getting the pistol by some means, previous preparation to slay, hunting up his adversary and challenging him to a combat.

Now, the law says if a party does certain things he is cut off from the right of self-defense; he is deprived of it. It says, first, if a party commences an assault, an attack, or battery upon another—if he commences an assault upon another, that would not justify his adversary in killing him, but if that adversary undertakes to use excessive violence, however, he would be guilty of the crime of manslaughter, if he did it right there at the time the assault was committed. And if the man *h*ade the first assault and kills him, because of the adversary's conduct, he is still guilty of a crime, because he was the man who precipitated it, brought it on, and he is cut off from the right of self-defense, though, of course, the act of the adversary may be out of proportion to the first act of the party who brings on the difficulty. Now, attacking another with a deadly weapon—a man attacks another with a deadly weapon and kills him in the course of that attack, he is cut off from the law of self-defense. Going to the place where the slain person is with a deadly weapon for the purpose of

provoking a deadly difficulty or with the intent of having an
157 affray—that shows deliberation. The law of self-defense is a law to be executed when the environment is such, or the surroundings are such, that the danger is created by the adversary, and he can not escape from it. There may be danger upon the part of this adversary, but if it is so far off that the party can avoid it, it is his duty to do that, but if he goes to the adversary, hunts him up, challenges him to a mortal combat, and then there, while that challenge is being accepted, or is about to be accepted, he uses a dangerous and deadly weapon, there is no self-defense in that; he is deprived of it. I repeat this proposition again: Going to the place where the slain person is, with a deadly weapon, for the purpose of provoking a difficulty, or with the intent of having an affray—in such a case he is deprived of the right of self-defense, because there is a condition that is the converse of a defensive condition; there is a condition that he has sought; there is a condition that he has created at the time. A little further upon this question, as to what is sufficient violent demonstration at the time of the killing to give a party the right to act upon appearances:

"To shoot down another on sight, and who at the time is making no hostile demonstration dangerous to life and limb, and especially if not prepared and armed so to do, is, in law, murder. It is murder, because the law tolerates no justification, and accepts no excuse for the destruction of human life on the plea of self-defense, except that the death of the adversary was necessary, or apparently so, to save his own life or his person from great bodily injury, and there shall be imminent danger of such design being accomplished. The danger to life or of great personal
158 injury must be imminent, present at the time of the killing, real or apparent, and so urgent that there is no reasonable mode of escape, except to take life."

That is the law stated in short form. Now, here is a case I propose to give you, and it is in illustration of what is meant by a man pursuing a difficulty, or hunting up an adversary. It is a Virginia case; the case of Vaiden v. Commonwealth, 12 Gratt., 717; Horr. & Thomp. Cas., Self-defense, 222:

"The deceased and Vaiden were at the latter's house one evening drinking and playing cards together. Some high words passed between them, growing out of the deceased charging Vaiden with cheating. Vaiden's wife told the deceased that he had promised to make no 'fuss,' to which he assented, said good night, and left the house. He did not go away, however, for he was heard in the yard swearing very loudly and apparently much enraged. Hearing him, Vaiden took up his gun and started for the door, but was induced by his wife not to go out. Guns were evidently used instead of walking sticks in that neighborhood, for just then the deceased called through the window that he wanted his gun, and the weapon was handed to him through the door by Mrs. Vaiden.

"The deceased then walked away, accompanied by two other persons, and by a son of Vaiden's, who went with the party as far as the fence to let them through the drawbars. As they stood at the fence talking Mr. Vaiden appeared with his gun, seeing which the deceased jumped over the fence, took hold of his gun by the barrel as if to use it as a club and rushed at Vaiden. The latter called out that if he did not stop he would shoot

him. The warning went unheeded, and when the deceased got
159 within a few feet of him, Vaiden, falling back a few steps, fired
The deceased then struck Vaiden two blows with the breach of his gun and staggered back, mortally wounded, dying a few hours afterwards. Vaiden, indicted for the killing, set up the plea of self-defense. But the court held that he being responsible for the altercation in following the deceased with his gun after he had departed from the house, could not avail himself of that plea, and he was convicted."

Another case, where a man cuts himself off from the right of self-defense, where he agrees with another to fight him with a deadly weapon. A man goes out and challenges, you either by word or act, to fight him with a deadly weapon, you accept the challenge, and you go out, and if you kill him you are guilty of murder, and if he kills you he is guilty of murder, because there is a deadly purpose to do a deliberate act that may result in death. There is no self-defense or manslaughter in it, because the law imperatively commands every one to abstain from a state of case where they may be kept from doing deadly violence, and yet be secure in their lives, and when one gives a deadly challenge to his adversary, and follows it up then and there by an act of violence that results in death to that adversary, that is murder.

It becomes necessary to detain you a little while longer upon the subject of threats, and upon the subject of the previous character of the deceased. In the first place, before previous character is to be considered at all it must be established in an intelligent, just, and proper way, it must be the reflection of the man's character in the community generally. If it is established in that way, it may or may not be any evidence at all in the case; it may not cut any figure in the case. We will see
160 what figure it does cut. It is the same way with threats; a man may make threats, and they of themselves, as you will learn presently, do not excuse the party who kills in the killing, because he made threats, because they are not of that character that would necessarily imply such a deadly condition which was so threatening in its character as that the party could not avoid it, but they become illustrative of a condition in such a way as to be used as facts in the case. Now, what are the threats that can be taken into account? They are threats that can be taken into account as illustrations in the case, where the party who kills is doing what he had a right to do at the time.

Although threats may have been made, just like an act of violence may have been committed, that may not be in existence at the time of the killing, and it may be a deadly act of violence, yet if either one of these conditions exist as affecting a party charged with killing, it does not make any difference if that violence did exist, he has not the law of self-defense, and the same way with threats. Now, threats which are communicated are taken into account for the purpose of showing what influence they had upon the mind of the defendant in the case, but before they can be taken into account for that purpose the party who was killed, at the time of the killing, must have been making some demonstration of violence of such a character when coupled with the threat as would satisfy a reasonable man situated as was the defendant, that he then and there had the purpose to take the life of the defendant, and that the defendant did not seek that

condition, did not hunt it up, did not challenge his adversary into a deadly
conflict, but that the condition was the creature of the adversary,
161 and brought into existence by him. That is the figure that threats
known to the defendant cut, and that is the only kind claimed here, but, of course, the defendant could not kill on account of threats alone, and, if he did, that would be evidence of malice aforethought, of premeditation. If he went off and prepared himself because of these threats, hunted up his adversary, challenged him into a fight that he might get a chance to take his life, that is murder pure and simple, and threats in such a case cut no figure, except as against the defendant. They cut no figure by way of mitigating his crime; they cut no figure by way of justifying his act. Now, here is a case which went before the Supreme Court of the United Stotes, in which threats and character were both considered, and I will read a part of it to you:

"Where the question is as to what was the deceased's attitude at the time of the fatal encounter recent threats may become relevant to show that his attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the quo animo of the defendant, 'that is, when they are not communicated; when they are communicated they may be evidence to show his condition of mind at the time of the act and that the attitude of the deceased was hostile to the defendant—that is to say, there was that in his actions that indicoted a purpose to kill, or that tended in that direction, and threats may be taken into account to illustrate that purpose, provided the party who does the killing was not the creator of that condition. If he went off and armed himself to have an encounter with the deceased and challenged him to fight, although the deceased may have accepted that
challenge, then he becomes the creator of that condition, and he
162 can not avail himself of the law of self-defense, and the threats can not excuse him.

"When one without fault is attacked by another, under such circumstances as to furnish reasonable ground for apprehending a design to take away his life or to do him some great bodily harm, and there is a reasonable ground for believing the danger imminent that such design will be accomplished, the assailed may safely act upon the appearances and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justified, although it may afterward turn out that the appearances were false, and that there was not in fact either design to do him serious injury, or danger that it would be done."

"When one without fault is attacked by another," in the language of the law I have read to you, meaning that he must be in the right, that he has not sought his adversary, not armed himself and challenged him to fight to get a chance to kill him if the occasion offers. When he is without fault, and the other attacks him in a way to indicate a design to take his life then and there, then he can safely act upon appearances.

"Unless the party has reasonable ground of apprehension at the time, the justification will fail; it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the party entertaining such fears in killing the other party by way of precaution, if there be no actual danger at the time."

"Actual danger of the kind, or a reasonable belief of such actual danger,
must exist at the time, else the justification will fail. Repeated
163 threats, even of a desperate and lawless man, will not, and ought
not, to authorize the person threatened to take the life of the threat-
ener, nor will any demonstration of hostility, short of a manifest attempt
to commit a felony, justify a measure so extreme."

"Jurists and text-writers appears to concur that antecedent threast alone, whether communicated or not, will not justify a subsequent deadly assault by the other party, unless the party who made the previous threats manifests, at the time of the act, a design to carry the threats into immediate effect."

That is the test; and threats then become illustrative. Standing alone they do not cut any figure, unless they cut a figure against the party doing the killing, as I have told you.

Previous bad character is of the same nature. You can not shoot a man because he is a man of bad character, because he is a man of lawless, desperate character. It is to be passed upon by you whether this man is proven to have had a bad character first. But if it has been proven, it does not necessarily result that this party could take his life for that reason. He is not an executioner of the law to that extent. He can only take it to save his own life from real danger, or danger that is apparent at the time of the killing, and danger that was not created by his wrongful act, but was brought into existence by the wrongful act of the other party. If a man is proven to be of bad character, and there is a question of doubt in your mind, or it is not clear to you as to what were the actions of the deceased at the time of the killing, and the defendant was in the right up to the time he did the firing, then you may consider his previous
bad character as illustrative of his acts, but he must have been
164 doing some act which would indicate it was an act of violence at
the time he was killed, to illustrate the character of that act, to show his purpose, and for these reasons his previous character may be taken into account, provided it was a state of case not created by the defendant. If the deceased was a man of bad character, and if he had made previous threats, and the defendant armed himself and sought him, hunted him up, and sought to put him in a condition where he could take his life, and he took his life in pursuance of that purpose, then it does not make any difference what his previous character was.

"Courts of justice everywhere agree that neither the bad character of the deceased, nor any threats that he may have made, forfeits his right to life, until, by some actual attempt to execut' his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own, or to prevent some felony upon his person."

That is the law adopted and stated in this case I have alluded to.

It seems that that makes the figure that threats and bad character cut plain to you, and that they are to have this weight and this weight alone.

You are to look at the evidence in this case to see what the condition at the time of the killing was, to see what the conduct of these parties was, what the attitude of this defendant was towards the deceased, to see whether

he hunted him up and challenged him into a conflict, and whether
165 or not while that challenge was being accepted, or the party was preparing to accept it, the defendant drew a deadly weapon and fired it at the deceased and killed him, and if that was the case, and if the evidence shows previous selection of this deadly weapon, previous preparation of it, and hunting up of the adversary, the going to the place where the adversary was when the danger to his life was not real or apparent, and was not of a deadly character, or if it was danger that he could have avoided, then self-defense passes out of the case. If there was no purpose simply to select the deadly weapon in self-defense, but upon the contrary there was a purpose to select it, and seek an opportunity to use it in a deadly way, then manslaughter has passed out of the case, and there could not be anything else but the condition of murder in it.

It is not much trouble to find what the circumstances were in this case, because witnesses of reasonable intelligence have come before you and given you the facts, and in their statements there is but little difference, except in the method of stating facts as coming from different parties. You are to judge of the credibility of this testimony in the light of its reasonableness, probability, and consistency, and in the light of whether or not the testimony of one witness as given agrees in salient points with the testimony of another witness, and if it does that proposition is strengthened, because if a proposition asserted by a witness is true every other proposition that is true in the case will substantiate and harmonize with it, upon the principle that all truths harmonize and agree. If a proposition, on the contrary, is not true, then there will be disagreement between that and that which is true. One of the methods of determining
166 the credibility of evidence is to look to how it is supported by other facts, to see whether it is consistent in the light of the other facts, whether it is reasonable in the light of your observation and experience in life, whether it is given in a way by the witness that carries the truth with it, according to your observation of the usual method of making statements by witnesses who tell the truth.

If you are satisfied of the truth of this charge as laid in the indictment beyond a reasonable doubt, your duty is to convict. If you are satisfied of the truth of the charge of manslaughter beyond a reasonable doubt, your duty is to convict the defendant of that crime, but you have no right to convict him of that crime if you find he is guilty of murder under the law; you have no right to enter into a compromise with crime in that way. Your duty is to find if crime exists, and then say what that crime is exactly as the law defines it, and to pronounce it as it is. If the crime is murder, your duty is to say so; and if you find it is manslaughter it is your duty to say so. If you find there is a case of self-defense here, as I have defined it to you, it is your duty to say so, and acquit the defendant. When the law says the charge is to be proven beyond reasonable doubt it does not mean it is to be established so there can be no doubt brought against it, no conjecture against it, or no surmise arrayed against the conclusion, but it means there is that state of case established that would satisfy a man of reasonable mind that the condition is proven that the law says shall be proven to make a crime, whatever it may be. It means

there is driven out of the case as confronting the conclusion of guilt
167 all doubts for which good reasons can not be given; it means that the case is so far proven by the testimony, and the crime defined by the law is so far established, that it is proven to that high degree of certainty that reasonable men would believe it if it was a matter they had to decide in the ordinary affairs of life outside of the jury box. It is a real substantial doubt, and not a mere conjecture as to the possibility of innocence, but, on the contrary, it is carried beyond that point; it is carried beyond the point where the case is established as the law requires it to be established. On the contrary, if it is not carried to that point, but there is a real substantial doubt of guilt, flowing naturally and reasonably from the testimony in the case, so as to leave it in the condition you can not say you have an abiding conviction to a moral certainty—and that means to a reasonable degree of certainty, to a certainty that satisfied a reasonable man—of the truth of the charge, then there is a real substantial doubt of guilt in it, and you should act upon that.

Gentlemen, you will retire to make up your verdict.

1:15 p. m.

Verdict: "Guilty of murder."

168 To which the defendant at the time objected.

1st. Because, as bearing upon the subject of previous preparation, the cour trefused to instruct the jury without modification as requested by defendant, as follows, "That preparation in the heat of blood may be followed by manslaughter as well as under a certain state of case it may be followed by murder or self-defense." To which refusal of the court to so instruct the jury the defendant at the time excepted.

2nd. Because the court erred in instructing the jury as follows:

"A man has a deliberate intent to kill in the absence of a right to kill under the law of self-defense, and in the absence of that which would mitigate the offense to manslaughter. He can not have a deliberate intent to kill, and then say that his offense was only manslaughter, because the fact that he had an intent to kill implies that he deliberated over that purpose, that he prepared himself for it, and, as you will learn further on, where deliberation, where premeditation upon a purpose to slay, where previous preparation to execute that purpose exists, there is banished from the case that condition known as manslaughter, because that grows into existence upon sudden impulse, without previous preparation to take life. Whenever that exists we have malice and nothing else, unless it is a case where a man prepares himself for self-defense, and then in order to exonerate the case a condition that gives him a right to use that weapon in self-defense, then there is not in it that intermediate condition, because there is too much deliberation about it, there is too much evidence of a preconceived design to kill that does not exist in manslaughter,
169 because it is something that springs into existence upon the spur of the moment because of some provocation offered by the party who kills, at the time of the killing, or so near thereto as that the party did not have time for the blood to cool, and the deliberate selection, preparation, and use of a deadly weapon shows cooling time sufficient."

After argument of counsel the jury, after deliberation, returned into court the following verdict:

"We, the jury, find the defendant guilty of murder as charged in the within indictment."

(Signed)

AUGUST FISCHER,
Foreman.

And thereupon the defendant filed his motion for a new trial in words and figures following:

In the circuit court United States for the western dist. of Ark. Feb. term, A. D. 1893.

UNITED STATES
against
JOHN GOURKO. } Motion for new trial.

Now comes the defendant, John Gourko, and moves the court to grant him a new trial in the case wherein he was convicted upon indictment No. ——, upon a charge of murder, upon the following grounds:

First. Because the court misdirected the jury upon the trial of the case.

Second. Because the verdict of the jury was contrary to law and evidence.

N. L. MARMON,
THOS. H. BARNES,
Attys. for Deft.

(Endorsed on back:) Filed Apr. 5, 1893. S. Wheeler, clerk.)

170 And thereupon the court overruled said motion and pronounced the sentence of death upon the defendant, and in overruling made the following remarks:

171 UNITED STATES
vs.
JOHN GERKO.

The motion for a new trial, filed in this case, contains the following causes:

First. Because the court misdirected the jury upon the law of the case.

Second. Because the verdict of the jury was contrary to the law and the evidence.

It will be observed that the causes set out in the motion are general in character. I am not aware of any mistake of law in the charge of the court. I think the law was fully and correctly given on all the points involved in the case. Nor can I say that any error was committed by the jury in finding their verdict, and that therefore the same is not contrary to the law or the evidence. This being true, any interference on my part with this verdict would be purely arbitrary and therefore wrong and improper. In my judgment one of the fruitful causes of the alarming in-

crease of the crime of murder is the undue and sometimes reckless and improper interference of courts with the verdicts of juries. I would not hesitate to interfere with a verdict of a jury if it was unwarranted by the law or the facts, but if authorized by both it should stand as a proper characterisation of the act done. If these conditions underly it it should be disturbed with greater reluctance in a case of murder than in a case where the rights of society and its members have been affected less seriously. The motion, in my judgment, should be overruled and it is so ordered.

172 To which judgment and sentence of the court the defendant at the time excepted.

And time having been given the defendant to prepare the same, he now tenders this his bill of exceptions and prays that the same may be signed and made a part of the record, which is accordingly done.

I. C. PARKER,
District Judge, holding Circuit Court.

173 *Assignment of errors—Filed June 26, 1893.*

In the circuit court of the United States for the western district of Arkansas.

THE UNITED STATES, PLAINTIFF,
against
JOHN GOURKO, DEFENDANT. } Murder.

The defendant in the above-entitled cause, John Gourko, files this his assignment of errors, committed on the trial of said cause, to wit:

1st. It was error for the court, as bearing upon the question of previous preparation, to refuse to instruct the jury without modification, as requested by the defendant:

"That preparation in the heat of blood may be followed by manslaughter, as well as under a certain state of case it may be followed by murder or self-defense."

2nd. It was error in the court to instruct the jury as follows:

"A man has a deliberate intent to kill in the absence of a right to kill under the law of self-defense, and in the absence of that which would mitigate the offense to manslaughter. He can not have a deliberate intent to kill and then say that his offense was only manslaughter, because the fact that he had an intent to kill implies that he deliberated over that purpose, that he prepared himself for it, and, as you will learn further on, where deliberation, where premeditation upon a purpose to slay, where previous preparation to execute that purpose exists, there is banished from the case that condition known as manslaughter, because that grows

174 into existence upon sudden impulse, without previous preparation to take life. Whenever that exists we have malice, and nothing else, unless it is a case where a man prepares himself for self-defense, and then, in order to exonerate himself from that killing, he must execute that preparation where the law gives him a right to do it, and in a defensive way; he must prepare himself for self-defense, but if he kills

when there is no case of self-defense such act of previous preparation becomes criminal in its character, because of his subsequent act, and it becomes attached to that act."

3rd. The court erred in instructing the jury as follows:

"The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehand, and whenever a party deliberately selects and prepares himself to take life by hunting up a deadly weapon and arming himself with such deadly weapon, preparing that deadly weapon so he can use it in a deadly way, if there is not in the case a condition that gives him a right to use that weapon in self-defense, then there is not in it that intermediate condition, because there is too much deliberation about it, there is too much premeditation, there is too much evidence of a preconceived design to kill that does not exist in manslaughter, because it is something that springs into existence upon the spur of the moment because of some provocation offered by the party who kills, at the time of the killing or so near thereto, as that the party did not have time for the blood to cool, and the deliberate selection, preparation, and use of a deadly weapon shows cooling time sufficient."

175 Wherefore, the above-stated errors considered, the said defendant prays that the judgment and sentence against him be reversed.

JOHN GOURKO,
By THOS. H. BARNES,
Attorney.

176 *Petition for writ of error—Filed June 26, 1893.*

In the circuit court of the United States for the western district of Arkansas.

THE UNITED STATES, PLAINTIFF,
against
JOHN GOURKO, DEFENDANT. } Murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner respectfully represents that at the February term, A. D. 1893, of this court, he was convicted on the indictment charging him with the crime of murder, and that the said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial in said cause there is great and manifest error to the prejudice and great damage of your petitioner.

He, therefore, prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing the said cause and the records therein to the said Supreme Court, in order that the same may be there reëxamined, and if error be found, that the judgment and sentence against him therein may be reversed.

JOHN GOURKO,
By THOS. H. BA[illegible]

177 *Poverty affidavit—Filed June 26, 1893.*

In the circuit court of the United States for the western district of Arkansas.

JOHN GOURKO, PLTFF. IN ERROR,
vs.
THE UNITED STATES, DEFT. IN ERROR.

I do solemnly swear that I am the identical John Gourko convicted of murder at the February term, 1893, of the United States circuit court for the western district of Ark., and now seeking a writ of error to the Supreme Court of the United States.

That I am poor, without property of any kind, real or personal, and that I utterly without means to pay the costs of prosecuting said writ of error, and further affiant sayth not.

JOHN GOURKO.

Subscribed and sworn to before me by John Gourko this 24th day of June, 1893.

STEPHEN WHEELER, *Clk.*
By J. M. BAXTER, *D. C.*

I hereby certify that the plaintiff in error, John Gourko, is wholly unable to pay any of the costs of his case in the Supreme Court, as he is not the owner of any property whatever.

June 26, 1893.

I. C. PARKER,
U. S. Dist. Judge.

178 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the U. S. circuit court for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States of America and John Gourko, a manifest error hath happened, to the great damage of the said John Gourko, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 27 day of June, in the year of our Lord one thousand eight hundred and ninety-three.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western District of Arkansas.

179 UNITED STATES OF AMERICA, *ss:*

To Jas. F. Read, U. S. district attorney for the western district of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein John Gourko, under indictment for murder, is plaintiff in error and the United States defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable I. C. Parker, judge of the district court of the United States for the western district of Arkansas, this 29 day of June, in the year of our Lord one thousand eight hundred and ninety-three.

I. C. PARKER,
U. S. District Judge, holding Circuit Court.

180 I, James F. Read, U. S. dist. att'y for the western dist. of Arkansas, hereby accept service of the within citation this 29 day of June, 1893.

JAS. F. READ,
Dist. Atty.

181 United States of America, western district of Arkansas.

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record in the case of U. S. vs. John Gourko, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 7th day of July, A. D. 1893.

[SEAL.] STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

182 (Indorsement on cover:) Case No. 15356. Term No. 972. John Gourko, plaintiff in error, vs. The United States. W. Arkansas. C. C., U. S. Supreme Court, U. S., clerk's office. Received July 22, 1893. Filed July 22d, 1893.

Office Supreme Court U. S.
FILED.
NOV 13 1893
JAMES. H. McKENNEY.
CLERK.

153-183

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN GOURKO, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 972.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States,

OCTOBER TERM, 1893.

JOHN GOURKO, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES. } No. 972.

The plaintiff in error was convicted for murder on February 24, 1893, on an indictment found in the circuit court of the United States for the western district of Arkansas, at the November term, 1892, charging him with the murder of one Peter Carbo, both being white men and not Indians.

The only errors assigned are to the refusal of the court to grant an instruction asked for by the defendant, and to two certain portions of the charge given by the court to the jury.

The same irregularity occurs in this record which appears in the record of a number of similar cases which have come up on writ of error from the circuit court in Arkansas, viz: That the only bill of exceptions that appears in the record at all is as to the action of the court on denying the motion for a new trial. Yet in this case, as in all the others, it seems to be expected that the alleged

errors and irregularities occurring in the course of the trial will be considered and acted on here as though they were regularly introduced by a proper bill of exceptions.

While the testimony in this case is unusually brief, yet the charge of the court to the jury extends over twenty-seven pages of this printed record. And it appears here, as it does in each of the other cases coming up from this court, that the extracts made from the charge of the court, and relied on as grounds of error here, contain statements of doctrines and principles of law which elsewhere in the charge are frequently repeated in different and sometimes more accurate language. So that in endeavoring to ascertain how far, if at all, the court has erred in delivering the law to the jury, it becomes necessary to look beyond the extracts from the charge, quoted in the assignments of error, to the whole charge.

The facts of this case, in brief, are these:

The deceased and the plaintiff in error were engaged as laborers in the coal mines in the Indian country. The deceased was a large, muscular, powerful man, while the plaintiff in error was smaller and weaker in frame, and was on the occasion of the homicide suffering from the effect of chills and fever.

On the morning of the homicide, and about half an hour before its occurrence, the deceased and plaintiff in error were standing on the street in front of the post-office; they were both Poles and were talking in the Polish language, but the epithets and denunciatory terms employed in the altercation were expressed in English. The deceased shook his fist in the face of the plaintiff in error

and applied to him opprobrious epithets. The plaintiff in error went off, was absent about ten minutes, and on his return explained his absence by stating that he had gone to get a marshal to come and arrest the deceased. The deceased was not present when the plaintiff in error returned. About half an hour after this the deceased was in a billiard room watching a game of billiards between Leachman and Rutledge, when the plaintiff in error appeared at the door of the billiard room and, addressing the deceased, said: "Pete, you called me a son of a bitch, didn't you?" to which Pete replied "Well," or something of the kind. The plaintiff in error then said: "Come and go with me down here and I will fix you for that; we will settle this matter; I will fix you." The deceased stepped out of the door and then said: "You want to fight, don't you?" and the plaintiff in error said, "Yes." The deceased then said: "You have got a gun or knife on you," to which the plaintiff in error made a reply, but as to what that reply was the testimony is obscure. The deceased then said: "If you want to fight we will fight right here; here is a good enough place to fight."

The plaintiff then drew his pistol from his hip pocket and fired three shots; the first was fired in the air, the second was fired over the head of the deceased, the third struck the deceased on the left side of his head, about an inch above the cheek bone, right in the temple. From this shot the deceased died in a few minutes. The parties were 5 or 6 feet apart at the time. The deceased at the time had his hand in his bosom, between his outer and under shirt, where he habitually carried it. An exami-

nation, immediately after the death, of the body of the deceased, disclosed that he was unarmed at the time of the occurrence. Immediately after the shooting the plaintiff in error started off "in a tolerable fast walk," without saying anything, having returned the pistol to his pocket. He was pursued and caught by Leachman, who threw him down, when the plaintiff in error again drew the pistol from his pocket and turned it toward Leachman. The pistol was taken from him by "Gus Felix," and Leachman started off with the prisoner to turn him over to the night watchman. He met on the way United States Marshal Hendricks, and turned his prisoner over to him.

When the plaintiff in error armed himself with the pistol, and how and from whom he obtained it, does not appear in the testimony. It does appear that the deceased had previously charged the plaintiff in error and his brother, jointly, with having stolen six carloads of coal from him, and this had been the subject of frequent disputes between them, and the deceased cherished bad feeling toward the plaintiff in error and his brother. The plaintiff in error appears to have been between 18 and 19 years of age at the time, and to have been in this country but four years. His brother, who was examined as a witness on the trial, was 17 years of age, and had been in this country but two years. The deceased appears to be about 35 or 40 years of age, and weighed over 200 pounds; the plaintiff in error weighed about 130 or 140 pounds. The deceased appears not to have borne the character of a peaceable and quiet man, while the plaintiff in error appears to have borne a good character.

ERRORS ASSIGNED.

The only errors assigned are to the refusal of the court to give an instruction asked for by the defendant and to two certain portions of the charge delivered by the court to the jury.

(1) The instruction asked for by the defendant was:

> That preparation in the heat of blood may be followed by manslaughter, as well as under a certain state of case it may be followed by murder or self-defense.

It appears on page 87 that the court really gave this instruction to the jury, but with such explanation and qualification as was manifestly proper.

(2) The portions of the charge of the court which were excepted to contain the definition given by the court to the jury of "manslaughter" and the features which distinguish voluntary manslaughter from murder.

While the charge throughout is distinguished by great looseness of expression and redundancy of language, it contains substantially, we submit, correct statements of the law.

Section 5341 Revised Statutes provides:

> Every person who within any place or district of country under the exclusive jurisdiction of the United States (sec. 5339) unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which stabbing, striking, wounding, or shooting, or other injury, such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter.

THE LAW ASSOCIATION —OF— PHILADELPHIA.

Mr. Justice Field, in the charge given by him, in *United States* v. *Outerbridge* (5 Sawyer, 620-625), defines voluntary manslaughter to be:

> When committed with a design to kill under the influence of a sudden and violent passion, caused by great provocation, which the law in its tenderness to the infirmity of human nature considers such a palliative of the offense as to rebut the presumption which would otherwise arise of malice. * * * The difference between murder and manslaughter consists in the existence of malice, express or implied in the one case, and the absence of malice in the other. Now malice is implied in every case of intentional homicide, that is to say, when once it is established that a person was intentionally killed, the law implies that malice existed in the party who caused his death. If there are any circumstances of excuse or palliation, which will rebut the implication of malice, it is incumbent upon him to show them. The burden of proof rests upon him, for the law presumes that every person intends to produce the results, which are the usual consequences of his acts.

In *United States* v. *Cornell* (2 Mason, 91), it was said:

> The legal meaning of malice aforethought in homicide is not limited to homicide committed in cold blood, with design and premeditation, but embraces all cases where the act was done with such cruel circumstances and means as indicate a wicked, depraved, and malignant spirit, as where the punishment inflicted by a person is inhuman in its nature and duration and wholly disproportioned to the offense, though there may have been provocation.

The statements of the law contained in the charge delivered by the court to the jury on the trial of this case will be found to be not at variance with the principles as announced in the opinion quoted.

HOLMES CONRAD,
Assistant Attorney-General.

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